Frank N. Balch

VOLUME IX. NUMBER 4.

Massachusetts Law Quarterly

MAY, 1924

CONTENTS

Issued Quarterly by the
MASSACHUSETTS BAR ASSOCIATION, 60 State St., Boston, Mass.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912,

Of Massachusetts Law Quarterly, published quarterly at Boston, Mass., for April 1, 1924.

Publisher, Massachusetts Bar Association, 60 State Street, Boston, Mass.

Editor, The Publication Committee of the Association.

Managing Editor, Frank W. Grinnell, Secretary of the Association.

Business Managers, Same as above.

Owners, Massachusetts Bar Association.

President, Thomas W. Proctor. *Treasurer*, Charles B. Rugg. *Secretary*, Frank W. Grinnell.

Known bondholders and other security holders, none.

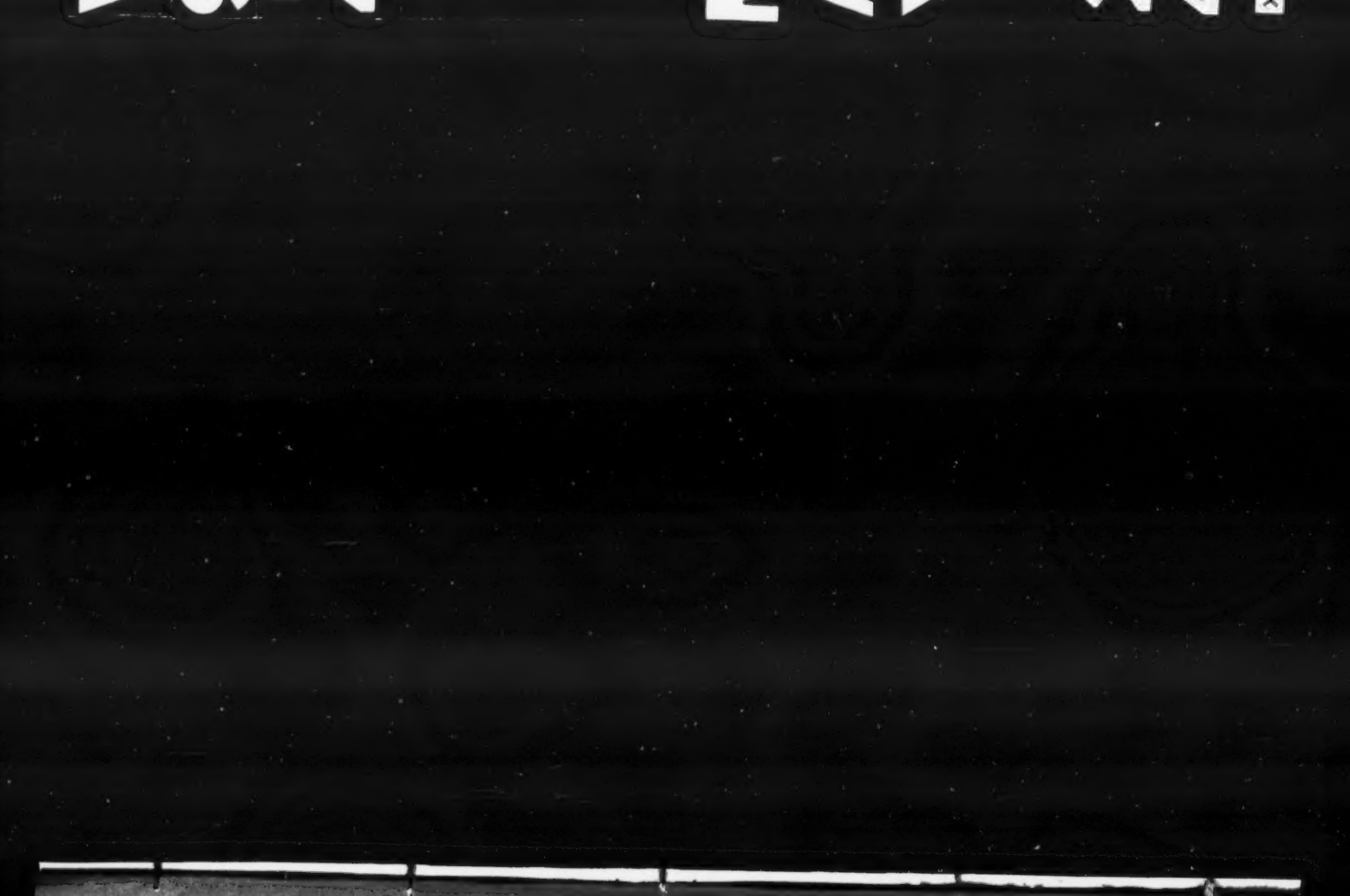
FRANK W. GRINNELL.

Sworn to and subscribed before me this 17th day of March, 1924.

Virgil C. Brink,
Notary Public.
(*My commission expires November 13, 1924.*)

[seal]

Entered as Second-Class Matter at the Post Office at Boston.



INTRODUCTORY STATEMENT.

Pictures in this Number.

Dean Inge, in a lecture on "The Victorian Age," referred to Carlyle's practice of placing before him, on his desk, a portrait of the man about whom he was writing, and suggests that those who, today, speak with tolerant condescension of some of the great Victorians, might learn something by adopting this practice. It is for this reason that we have reproduced many portraits of judges and lawyers in this magazine in connection with legal history, in order, as far as possible, to translate names into living beings. In view of the present political controversies about the Supreme Court of the United States, we reproduce here several group pictures of that court.

In a recent communication to one of the newspapers in Massachusetts, as to the action of the court in holding acts of congress unconstitutional, the writer of the communication used the phrase "legal bullies of the John Marshall stripe." Of course, lawyers are not in the habit of speaking of the court in that language, but we can all learn something by studying the Jarvis portrait of Marshall, which appears as the Frontispiece to volume II of Beveridge's "Life of Marshall", and was reproduced in this magazine for November, 1918.

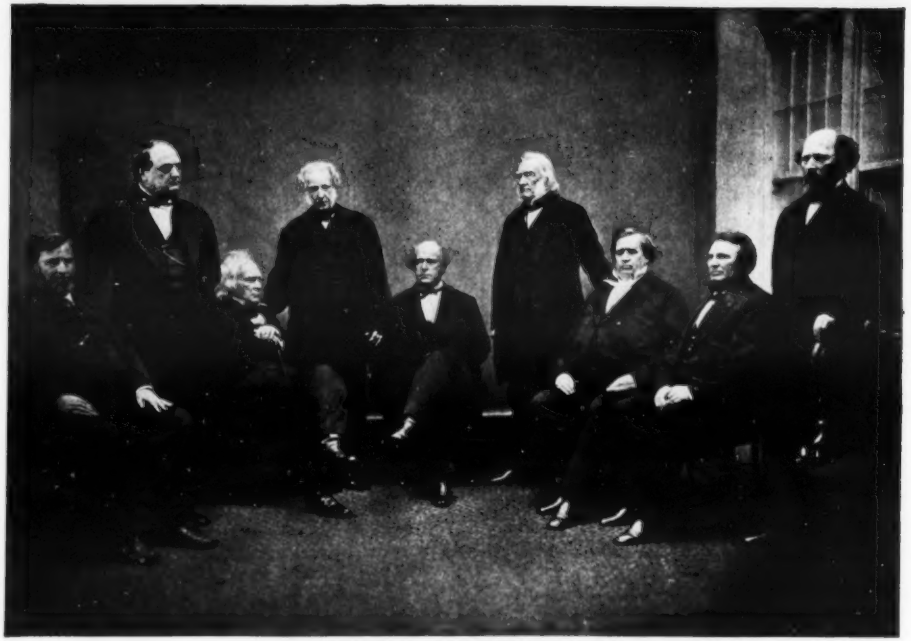
It is well for us to remember the description in Beveridge's first volume, of Marshall as the most cheerful man in the army at Valley Forge. The cheerfulness of Mark Tapley, in Dickens' "Martin Chuzzlewit" may be annoying to some readers, but the picture of Marshall keeping up the spirits of Washington's soldiers during their sufferings in the winter at Valley Forge, can hardly annoy the most captious critic. It deserves a prominent place in the bright spots of American history.

The groups here reproduced of some of the judges who followed him on the court are worth looking at occasionally in order to see them better as living forces, refresh our imaginations and give us a better understanding of the court and its service to the American people.

Cartoons.

Three cartoons are also reproduced in this number, as typical current comments on certain aspects of our constitutional government.

F. W. G.



THE SUPREME COURT IN 1865

Left to right: Davis, Swayne, Grier, Wayne, Chief Justice Chase, Nelson, Clifford, Miller, Field.

(Reproduced by permission from Warren's "Supreme Court in United States History.")

THE SUPREME COURT IN 1882

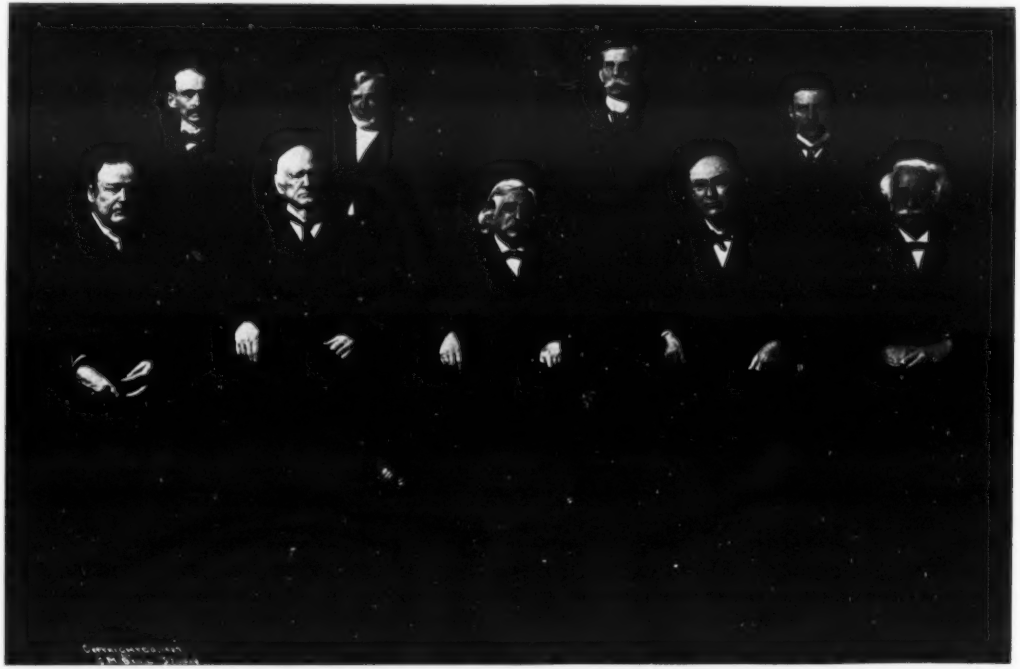
Standing: Wood, Gray, Harlan, Blatchford. *Seated:* Bradley, Miller, Chief Justice Waite, Field, Matthews.

(Reproduced by permission from Warren's "Supreme Court in United States History.")

THE SUPREME COURT IN 1899

Standing: Peckham, Shiras, White, McKenna. *Seated:* Brewer, Harlan, Chief Justice Fuller, Gray, Brown.

(Reproduced by permission from Warren's "Supreme Court in United States History.")

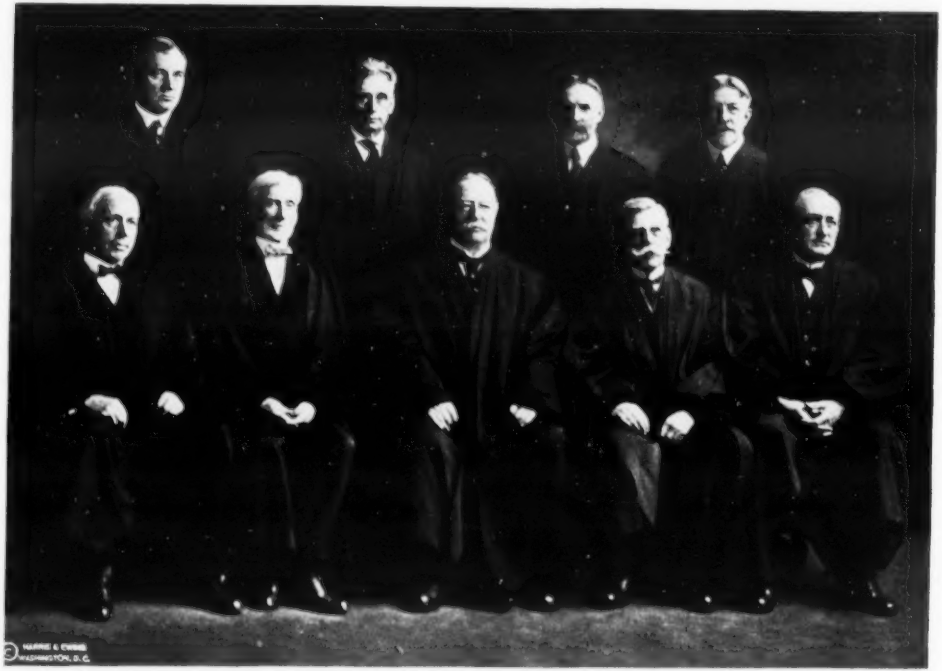


THE SUPREME COURT, 1906–1909

Standing: Day, McKenna, Holmes, Moody.
Sitting: White, Harlan, Chief Justice Fuller, Brewer, Peckham.

THE SUPREME COURT, 1914–1916

Standing: Pitney, Van Devanter, Lamar, McReynolds.
Sitting: Day, McKenna, Chief Justice White, Holmes, Hughes.



THE SUPREME COURT, 1923——

Standing: Butler, Brandeis, Sutherland, Sanford.
Sitting: Van Devanter, McKenna, Chief Justice Taft, Holmes, McReynolds.

MR. JUSTICE HOLMES IN 1862.

NOTE.

Happening to look at an old photograph album, while this number was going to press, the Editor's attention was caught by this picture. Looking on the back he found

"CAPTAIN O. W. HOLMES, Nov. 11th, 1862."

Unlawful Laws of Congress*

The popular discussion of the right of the United States Supreme Court to declare unconstitutional, invalid, or ineffective acts of Congress which are beyond the powers delegated to that body, or which are in direct violation of provisions contained in the Constitution, has shifted somewhat from denying that the court possesses such a power or duty to putting forth plans for regulating or limiting that power.

A full knowledge of all of the facts is always essential to the intelligent discussion of any question. So, as a further contribution to this discussion, we are publishing a list of the cases in which the court has invalidated Acts of Congress, and have stated very briefly the basis of each decision.

It will be a surprise to know that in the one hundred and thirty-five years which have passed since the adoption of the Constitution, the Supreme Court has declared Acts unconstitutional in only forty-eight cases.

The first case in which the Court passed on this question was Marbury v. Madison in 1803, and, as one reads through the list, he will no doubt be impressed by the small number of instances in which the ruling was of great national importance, or affected the rights and privileges of any considerable portion of the people.

1803.

Marbury v. Madison, 1 Cranch, 137.

Declared unconstitutional provisions of Act Sept. 24, 1789, as attempting to give to the Supreme Court original jurisdiction in other cases than those prescribed in the Constitution.

1857.

Dred Scott v. Sandford, 19 How. 393.

Declared unconstitutional the "Missouri Compromise," Act March 6, 1820, on the ground that an act which prohibited a citizen from owning certain property in territory north of a certain line and granted the right to others was not warranted by the Constitution.

1865.

Gordon v. United States, 2 Wall. 561.

Declared unconstitutional provisions of Act March 3, 1863, granting appeals from the Court of Claims to the Supreme Court; the reason being that an act which gave the head of an Executive Department the right to revise decisions of a court, denied to that court the judicial power, from the exercise of which alone, appeals can be taken.

1867.

Ex parte Garland, 4 Wall. 333.

Declared unconstitutional provisions of Act Jan. 24, 1865, prescribing a test oath that the opponent had never voluntarily borne arms against the United States as a qualification for admission to practice before the Supreme Court; the reason being that such act was a bill of attainder.

1868.

Reichert v. Felps, 6 Wall. 160.

Declared unconstitutional provisions of Act Feb. 20, 1812, authorizing a board of revision to pass on titles already confirmed by other agents of the government; the reason being that Congress is bound to regard public treaties, and the act violated the provisions of the act of cession of the territory by the state of Virginia to the United States.

1869.

The Alicia v. United States, 7 Wall. 571.

Declared unconstitutional provisions of Act June 30, 1864, purporting to give jurisdiction to the Supreme Court of prize cases appealed from the District to the Circuit Court by a prior act, and not disposed of by the Circuit Courts.

1870.

Hepburn v. Griswold, 8 Wall. 603.

Declared unconstitutional the Legal Tender Acts of 1862–63, in so far as they made United States notes a legal tender in payment of debts contracted before the passage of the act.

1870.

United States v. De Witt, 9 Wall. 41.

Declared unconstitutional provisions of Act March 2, 1867, which prohibited the sale of petroleum below a certain standard; the court holding that the act was unconstitutional, in that it prohibited trade within the limits of a state.

*Reprinted from West Pub. Co.'s Docket Jan. 1924

Unlawful Laws of Congress

1870.

Justices of Supreme Court v. Murray, 9 Wall. 274.

Declared unconstitutional Act March 3, 1863, providing for the removal of a judgment in a state court in a case tried by a jury to the Circuit Court of the United States for a retrial, as a violation of the Seventh Amendment to the Constitution.

1871.

Buffington v. Day, 11 Wall. 113.

Declared unconstitutional that portion of the Income Tax Laws of 1864, 1865, 1866, and 1867 which imposed a tax upon the salary of judicial officers of a state.

1872.

United States v. Klein, 13 Wall. 128.

Declared unconstitutional a provision of the Appropriation Act of 1870 (Act July 12, 1870) which annulled the effect of the President's pardon on one who participated in the Rebellion.

1873.

United States v. Baltimore & O. Ry. Co., 17 Wall. 322.

Declared unconstitutional provisions of the Revenue Acts of 1864 and 1866 which laid a tax on interest on bonds issued by the city of Baltimore, on the ground that the federal government had no right to levy tax on the instrumentalities of the state.

1876.

United States v. Reese, 92 U. S. 214.

Declared unconstitutional provisions of Act May 13, 1870, providing for the punishment of all who refused to receive and count the votes of citizens having all of the qualifications of voters, because of their race, color, or previous condition of servitude; the court holding that the first section of the act simply established the right of such citizens to vote, but provided no punishment for its violation, and, further, that the Fifteenth Amendment did not confer the right of suffrage upon any one, but simply prevented the states, or the United States, from giving preference to one citizen over another.

1878.

United States v. Fox, 95 U. S. 670.

Declared unconstitutional provisions of Act May 31, 1870, that one against whom bankruptcy proceedings are commenced, who within three months prior thereto obtained goods with the intent to defraud, shall be punished by imprisonment. Congress cannot declare an act an offense which has no relation to the execution of a power of Congress, or to any matter within the jurisdiction of the United States.

1879.

United States v. Steffens, 100 U. S. 82 (Trade-Mark Cases).

Declared unconstitutional provisions of Act July 8, 1870, and Act August 14, 1876, relating to trade-marks, on the ground that this matter was not delegated to Congress. The whole subject of trade-mark property and the civil remedies for its protection existed prior to the act of Congress, and are covered by the common law.

1883.

United States v. Harris, 106 U. S. 629, 1 Sup. Ct. 601.

Declared unconstitutional provisions of Act April 20, 1861, providing for the punishment of persons conspiring to deprive any other person of the equal protection of the law, on the ground that no warrant can be found in the Constitution for its enactment.

1883.

United States v. Stanley, 109 U. S. 3, 3 Sup. Ct. 18.

Declared unconstitutional the first and second sections of Civil Rights Act March 1, 1875, punishing those who denied equal accommodations at inns, theaters, trains, etc., because of previous condition of servitude, as not being authorized by the Thirteenth or Fourteenth Amendments, which only prohibit the states from passing such laws.

1886.

Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524.

Declared unconstitutional provisions of Act June 22, 1874, which authorized a United States court in revenue cases to re-

quire the defendant or claimant to produce in court his private books and papers, as being repugnant to the Fourth and Fifth Amendments.

1888.

Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301.

Declared unconstitutional section 1064, R. S. D. C., in so far as they deny the right to a jury trial to one charged with a criminal offense. This decision established the right to trial by jury in police court cases in the District.

1892.

Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195.

Declared unconstitutional Rev. St. § 860, Interstate Commerce Act, as limiting the provisions of the Constitution, which declare that a person shall not be compelled in any criminal case to be a witness against himself.

1893.

Monongahela Navigation Co. v. United States, 148 U. S. 312, 13 Sup. Ct. 622.

Declared unconstitutional the provisions of Act Aug. 11, 1888, for stipulating that in estimating the sum to be paid by the United States for a lot and dam, the franchise of the corporation to take tolls shall not be considered or estimated. The court holds that what is just compensation for private property taken for public use is a judicial and not a legislative question.

1895.

Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 15 Sup. Ct. 673.

Declared unconstitutional the Income Tax Act of 1894 as a direct tax.

1896.

Wong Wing v. United States, 163 U. S. 228, 16 Sup. Ct. 977.

Declared unconstitutional that portion of Act May 5, 1892 (Chinese Exclusion Act), which provided that one adjudged to be not lawfully entitled to remain in the United States shall be imprisoned at hard labor and thereafter removed from the United States, on the ground that it provided in effect for imprisonment upon the adjudication of a judge or commissioner upon a summary hearing, and was therefore in conflict with the Fifth and Sixth Amendments, providing for presentment or indictment by a grand jury.

1899.

Kirby v. United States, 174 U. S. 47, 19 Sup. Ct. 574.

Declared unconstitutional so much of Act March 3, 1875, as provided that the judgment of conviction against the principal in the crime of embezzlement or larceny of property of the United States shall be evidence, in the prosecution against a receiver thereof, that the property was embezzled or stolen, on the ground that it was in violation of the Sixth Amendment, providing that an accused shall be confronted with the witnesses against him.

1901.

Fairbank v. United States, 181 U. S. 283, 21 Sup. Ct. 648.

Declared unconstitutional the provision of Internal Revenue Act June 13, 1898, providing for stamp tax on foreign bills of lading, on the ground that the tax was in effect a tax on the articles included in the bill of lading, and therefore a tax on exports prohibited by article 1, section 9, of the Constitution.

1903.

James v. Bowman, 190 U. S. 127, 23 Sup. Ct. 678.

Declared unconstitutional provisions of Act May 31, 1870, providing for punishment of individuals who, by means of bribery, prevent persons to whom the right of suffrage is granted by the Fifteenth Amendment, from exercising that right, on the ground that the provisions of the amendment apply to abridgments of the right by the United States, or by any state, and not to acts of individuals.

1905.

In re Heff, 197 U. S. 488, 25 Sup. Ct. 506.

Declared unconstitutional provisions of Act Jan. 30, 1897, relating to sale of liquor within a state to an Indian to whom an allotment of land had been made and the privileges of citizenship extended, as an improper exercise of the power to regulate commerce "with the Indian tribes."

Unlawful Laws of Congress

1905.

Rassmussen v. United States, 197 U. S. 516, 25 Sup. Ct. 514.

Declared unconstitutional provisions of Act June 6, 1900, providing that, in trials for misdemeanors in Alaska, six jurors should constitute a legal jury, on the ground that it was repugnant to the Sixth Amendment.

1906.

Hodges v. United States, 203 U. S. 1, 27 Sup. Ct. 6.

Declared unconstitutional provision of Act (R. S. §§ 1977, 5508) making it an offense against the United States for private individuals to compel negro citizens, by intimidation and force, to desist from performing their contracts of employment, as beyond the scope of the Thirteenth Amendment.

1908.

Howard v. Illinois Central Railroad Co., 207 U. S. 463, 28 Sup. Ct. 141.

Declared unconstitutional provisions of Employers' Liability Act June 11, 1906, extending its effect to all employés of agencies engaged in interstate commerce, on the ground that it regulated intrastate as well as interstate commerce in such a way that the provisions could not be separated.

1908.

Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277.

Declared unconstitutional provisions of Act June 1, 1898, making it a criminal offense against the United States for an agent or officer of an interstate carrier to discharge an employé because of his membership in a labor organization, as an invasion of the right of personal liberty and of property, as guaranteed by the Fifth Amendment.

1909.

Keller v. United States, 213 U. S. 138, 29 Sup. Ct. 470.

Declared unconstitutional provisions of Act Feb. 20, 1907, prescribing criminal punishment for the keeping, maintaining, supporting, or harboring of alien women for the purpose of prostitution, as beyond the powers delegated to Congress by the states.

1909.

United States v. Evans, 213 U. S. 297, 29 Sup. Ct. 507.

Declared unconstitutional provisions of District of Columbia Code, § 935, providing that in criminal prosecution the United States or the District shall have the same right of appeal as is given to defendant, with the further proviso that, if on appeal error should be found, a verdict in favor of the defendant should not be set aside. The court holds that this presents only a moot question, the decision of which is not a judicial function.

1911.

Muskrat v. United States, 219 U. S. 346, 31 Sup. Ct. 250.

Declared unconstitutional provisions of Act March 1, 1907, attempting to confer jurisdiction upon the Court of Claims, and by appeal upon the Supreme Court, of suits against the United States to be brought by Cherokee Indians to determine the validity of certain acts of Congress.

1911.

Coyle v. Smith, 221 U. S. 559, 31 Sup. Ct. 688.

Declared unconstitutional provisions of Act June 16, 1906, admitting Oklahoma to the Union, which provided that the state capital should not be changed from Guthrie prior to 1913, on the ground that, although accepted by an irrevocable ordinance, it ceased to be a valid limitation upon the power of the state after its admission.

1913.

Butts v. Merchants' & Miners' Trans. Co., 230 U. S. 126, 33 Sup. Ct. 964.

Declared unconstitutional provisions of Civil Rights Act March 1, 1875, denying the validity of their application to only the District of Columbia and places within the jurisdiction of the United States, as the sea, as not within the intent of Congress.

1915.

United States v. Hvoslef, 237 U. S. 1, 35 Sup. Ct. 459.

Declared unconstitutional provisions of Revenue Act June 13, 1898, for stamp tax on charter parties for carriage from state

ports to foreign ports, as a violation of the Constitution (article 1, § 9), providing that no tax shall be laid on articles exported from any state.

1915.

Thames & Mersey Marine Ins. Co. v. United States, 237 U. S. 19, 35 Sup. Ct. 496.

Declared unconstitutional provisions of Revenue Act June 13, 1898, imposing a stamp tax upon policies insuring cargoes against marine risks, as being in substance a tax upon exports contrary to Const., art. 1, § 9.

1918.

Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529.

Declared unconstitutional the first Child Labor Act, Act Sept. 1, 1916, as an invalid attempt by Congress, acting under its power to regulate commerce, to control to the practical exclusion of the states, all manufacture of articles intended for interstate shipment.

1920.

Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. 189.

Declared unconstitutional provisions of Revenue Act Sept. 8, 1916, providing that stock dividends shall be considered income; Congress having no power, within the Sixteenth Amendment, to define income, but simply to tax it without regard to apportionment according to the population.

1920.

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. 438.

Declared unconstitutional provisions of Act Oct. 6, 1917, which extended to claimants the rights and remedies under the Workmen's Compensation Law of any state, as authorizing and sanctioning action by the states in prescribing and enforcing rights, obligations, liabilities, and remedies designed to provide compensation for injuries to employés engaged in maritime work, and therefore beyond the power of Congress, which cannot delegate to the states the power given it by Const. art. 3, § 2, to legislate concerning rights and liabilities within the maritime jurisdiction.

1920.

Evans v. Gore, 253 U. S. 245, 40 Sup. Ct. 550.

Declared unconstitutional a provision of Act Feb. 24, 1919, so far as it imposes a tax upon the income of judges of the courts of the United States, including their salaries, as a violation of Const. art. 3, § 1, providing that the compensation of judges shall not be diminished during their term of office.

1921.

United States v. L. Cohen Grocery Co., 255 U. S. 81, 41 Sup. Ct. 298.

Declared unconstitutional a provision of Act Oct. 22, 1919, making it unlawful to make any unjust or unreasonable charge in dealing in necessaries, because it fixes no ascertainable standard of guilt, and does not adequately inform those accused of the nature and cause of the accusation against them, as required by the Fifth and Sixth Amendments.

1921.

Newberry v. United States, 256 U. S. 232, 41 Sup. Ct. 469.

Declared unconstitutional provisions of Corrupt Practices Act June 25, 1910, so far as it applies to party primaries or conventions, as not within the power conferred on Congress by Const. art. 1, § 4, which regulates the manner of holding elections, and by article 1, § 8, cl. 18, to make all laws necessary and proper for carrying into effect powers granted to it.

1922.

United States v. Moreland, 258 U. S. 433, 42 Sup. Ct. 368.

Declared unconstitutional a provision of Act March 23, 1906, which permitted punishment for an infamous crime to be imposed after prosecution instituted by information, and not by indictment, as a violation of the Fifth Amendment.

1922.

Bailey v. Drexel Furniture Co., 259 U. S. 20, 42 Sup. Ct. 449.

Declared unconstitutional provisions of second Child Labor Act, Act Feb. 24, 1919, on the ground that it was manifestly not a tax law, as it purported to be, but was

intended to regulate the employment of children, which is a matter reserved to the states under the Tenth Amendment.

1922.

Hill v. Wallace, 259 U. S. 44, 42 Sup. Ct. 453.

Declared unconstitutional provisions of the Futures Trading Act August 24, 1921, as beyond the powers conferred upon Congress by the commerce clause of the Constitution.

1923.

Adkins v. Children's Hospital of the District of Columbia, 43 Sup. Ct. 394.

Declared unconstitutional Minimum Wage Act Sept. 19, 1918, as an arbitrary interference with freedom of contract, in violation of the Fifth Amendment.

EDITOR'S NOTE.

As stated in the above article reprinted from "The Docket", the first case in which the Supreme Court of the United States declared an act of Congress void as unconstitutional was *Marbury* v. *Madison* in 1803. Hon. Charles Warren, however, in his "Supreme Court in United States History" and in his address before the Massachusetts Bar Association (printed in this magazine for December, 1922, p. 1), has shown us not only that the Supreme Court was vehemently criticised by the Jeffersonians because it had *not* declared certain acts of Congress void but, also, that the justices of the Supreme Court, sitting on circuit as "Circuit Justices" declared an act of Congress unconstitutional in the *Hayburn case* as early as 1792, only two years after the organization of the court. "The Anti-Federalists regarded the Court as a great source of protection to the people against encroachments of power by Congress. It was the Congress whose usurpation they feared, not the Court" (Massachusetts Law Quarterly, Dec., 1922, 10–12). The North American Review for April, 1924, contains an interesting article on "Five to Four Decisions" by Frank R. Savidge. See also Warren's Address before the Maryland State Bar Association in June, 1923. For various Bar Association votes see "Constitutional Review" April, 1924, p. 119 and MASS. LAW QUARTERLY, January, 1924, 12-16, 27-28. F. W. G.

COURT PROOF OF MARRIAGES, BIRTHS, AND DEATHS FROM RECORDS.

The Editor is informed that the Secretary of the Commonwealth, Hon. Frederic W. Cook, has carefully reconsidered the law governing the introduction in evidence of copies of records of births, marriages and deaths, and has prepared and will use in future new forms which, in the opinion of the Secretary and of the Attorney General's office, are clearly admissible in evidence. Heretofore a great variety of forms has been used throughout the state, some city and town clerks printing their own and others using stationers' forms. The Secretary of the Commonwealth does not supply the forms himself, but they are available as precedents for stationers and for city and town clerks who desire to follow the example set at the State House.

Counsel for cities and towns throughout the Commonwealth may do a public service if they ascertain the forms in use by their city or town clerks and test their admissibility by comparison with the form approved by the Attorney General. F. W. G.

THE PERMANENT COURT OF INTERNATIONAL JUSTICE.

Address by MANLEY O. HUDSON, Bemis Professor of International Law at the Harvard Law School

before

The Bar Association of the City of Boston, Massachusetts.
Boston City Club, March 27, 1924.

In St. Louis some days ago, I found two news items which furnish the *point de depart* for what I have to say today. The first was in the *Post-Dispatch*, to the effect that some one in New London, Connecticut, had given $72 to the City of New London on condition that it be allowed to accumulate for three hundred years; and it was estimated that at the end of that period the City would have $14,000,000 as a consequence. While I was lost in some reflections as to the state of mind of a person who would be interested in what might happen in this world three hundred years hence, I noticed in the *Globe-Democrat* a news item from Dallas, Texas, which told of the establishment of the Gutenberg Foundation in Dallas, with an impressive board of trustees and a capital fund of one dollar, which was to be allowed to accumulate for five hundred years; and the reporter told us that then there would be a capital sum of $40,000,000 to be used by the Gutenberg Foundation for the distribution and dissemination of information.

Those two items led me into some speculations on the span of human interest. When I talk about an international court and machinery for the administration of international justice, I sometimes feel that my hearers regard me as in the position of a person about to make a gift of one dollar to the Gutenberg Foundation of Dallas, Texas, or $72 to the City of New London.

It is, in the main, an investment for a future. But the subject has immediate importance, and to visualize this I will show you this chart which came from Geneva only yesterday,—a chart giving a list of international conferences held in 1923, other than conferences under the auspices of the League of Nations of which there is a great number. In one column, this chart gives a list of the conferences held, and in another it gives a list of the states represented in each. That might be very much enlarged if one took in the conferences of the League of Nations. It is clear that in the world in which we live there is a very large and vital international community; and, speaking to a group of lawyers, one does not need

to elaborate upon the thesis that this community must have machinery for the administration of justice.

Machinery for International Justice.

The problem of the last fifty years, during which this international community has grown so rapidly, has been a problem of establishing such machinery. It is true that the emphasis has been several times shifted. Fifteen years ago, when I first became interested in the subject, the emphasis was on compulsory arbitration, whereas it is today on getting efficient and continuous action. The emphasis may have shifted, but there has been throughout a perception of the necessity of permanent machinery for the administration of justice between nations according to law.

About the time of the Geneva arbitration, we began getting a network of international arbitration treaties of a bilateral character. The United States has an arbitration treaty today with almost every other Power. We have not been making any arbitration treaties within the last ten years, but we have them with most Powers and we have been renewing them during this decade.

The difficulty with this system is that it is hard sometimes to agree upon an arbitrator; there is no connection between different arbitrations, and it is very difficult for the lawyers of the world to know about the arbitrations that have actually happened. I hold in my hand, for instance, the opinion of Mr. Chief Justice Taft, sitting as sole arbitrator last fall in a case between Great Britain and Costa Rica, growing out of the Tinoco revolution in Costa Rica. It is almost impossible for one of us to obtain a copy of Chief Justice Taft's opinion. Unless you write to one of the governments concerned, there is no central place where you will find the material and information concerning an arbitration of that kind.

We have recently been setting up various permanent commissions to deal with differences between nations. I will only mention the Bryan peace treaties which were concluded by the United States between 1913 and 1921. About thirty of them were signed but not all have been ratified. Those treaties set up permanent commissions to deal with differences as they arise. So far as I can learn, no difference has ever been dealt with by any of the commissions set up by the Bryan peace treaties.

Then we pass to multi-national commissions, of which a few exist. The Central American Peace Congress which met in Washington two years ago created a multi-national commission for han-

dling differences between the Central American States. Only last week, the United States Senate consented to the ratification of a somewhat similar treaty, signed at the Santiago Conference of American states last May.

THE PERMANENT COURT OF ARBITRATION.

All of that is an effort at creating international machinery apart from a world-wide, common co-operation of some sort. At the first Hague Conference, in 1899, however, we did succeed in getting the Permanent Court of Arbitration. I hold in my hand a copy of the latest report of the Administrative Council of the Permanent Court of Arbitration, which gives a list of the members of the Court. There are about one hundred and forty members. They have never come together in the history of the Court, and they never will do so. The membership is simply a roster, or panel, from which nations may choose qualified arbitrators if they desire to submit a case to arbitration.

On the whole, I should say that the Permanent Court of Arbitration has worked well. Eighteen cases have come before it since 1900, when it was set up, and in all of the eighteen cases that machinery has undoubtedly been useful. The first case was the Pius Fund Case between the United States and Mexico, and the last case was the arbitration between the United States and Norway, in 1922. No case has been sent to the Permanent Court of Arbitration since the new Permanent Court of International Justice was set up, unless something has happened since last December, the date of my latest information.

I want to say a word about the American-Norwegian arbitration, the conduct of which has been criticised. We had some difficulty in getting an umpire. It was agreed with Norway that the President of the Swiss Confederation should choose the umpire, and he chose Professor Max Huber, a judge of the Permanent Court of International Justice. Judge Huber became ill and Mr. James Vallotton was appointed; it was he who gave the award of about $13,000,000 against the United States. There has been some criticism of that award in this country. My investigation has convinced me that Mr. Vallotton proceeded according to the law of the case as he understood it. The record shows that the burden of the responsibility rested on the umpire. Rarely in these cases does the award represent a composite judgment of the arbitrators. The reflections in certain New York newspapers on the character of Mr.

Vallotton were so base, so sinister and so inimical to the whole cause of international justice that I want to take this opportunity to denounce them and say that my investigation of them shows that they were wholly without foundation. Mr. Vallotton had a difficult task, and he performed it in a high-minded judicial spirit.

It is to be noted that in the American-Norwegian arbitration none of the arbitrators who sat in the case was a member of the Permanent Court of Arbitration. The parties used the procedure and the machinery at The Hague, but they did not use the personnel of the Permanent Court of Arbitration. The Governments went entirely outside of the list of one hundred and forty men to select the arbitrators, so that it might be contended with some justification that the case was not in the Permanent Court of Arbitration.

Now the Permanent Court of Arbitration set up in 1899 still exists and works. But there are three difficulties. First, it is hard to agree upon the arbitrators to compose the tribunals. Second, it is difficult for such tribunals to build up a cumulative body of international case law. Third, the arbitrators, although they have every disposition to abide by the law of the case, do not have the habit of working together in finding and making that law.

It has lately been popular in this country to say that tribunals set up out of the Permanent Court of Arbitration do not abide by law but enter into some process of compromise which neglects the law of the case. I think Mr. Root may be responsible for the popularity of that notion in this country. So far as my own researches go, I can find little to justify it. When lawyers are appointed to sit as arbitrators in a case, it seems to me that they generally act much as they would act if they were sitting as judges in that case. I think it is unfortunate that we have emphasized the distinction between arbitration on the one hand and adjudication on the other. So far as there is a common thread running through the eighteen cases before the Permanent Court of Arbitration, those eighteen cases have been developing a body of international law during these past two decades. So that I do not urge as one of the reasons for a new international court the difference between arbitration on the one hand and adjudication on the other.

The New International Court.

The reasons for having a new tribunal in addition to the Permanent Court of Arbitration are, first, the difficulties about choice of personnel; and second, the necessity for a cumulating body of

international case law. As long ago as 1907, when the second Hague Conference met, the United States was urging the establishment of an additional body, composed of a group of judges meeting together periodically and devoting all their time to the development of law through court decisions. Those reasons were felt by all of us to be compelling during the war, and we were determined to have a new international court as a part of the peace. Well, we have now succeeded in getting the Permanent Court of International Justice, set up in 1921 by a treaty quite independent, distinct, and separate from the Covenant of the League of Nations, a treaty forming no part whatever of the Treaty of Versailles, resting entirely on its own foundation. We call it the protocol of the Permanent Court of International Justice. The protocol has been signed today by forty-seven states. Those forty-seven states are all members of the League of Nations. The other states invited to become parties to the protocol are the United States, Ecuador and the Hedjaz.

The protocol came into effect in 1921 and in the fall of 1921 the judges were elected. I have seen a good many lawyers of various countries since the judges were elected, and, so far as my experience goes, lawyers everywhere are greatly pleased with the personnel of the new court. I think that our own American on the Court, Professor John Bassett Moore, is to be rated as one of the outstanding judges. The other judges are all men of the highest professional standing and of first-rate ability, and I think one has to say, as a consequence of their work for the past two years, that they are judges who are worthy of the responsibility that has been placed upon them.

The Work of the New Court to Date.

The Court held five meetings during 1922 and 1923. In 1922, in speaking on this subject in various places, I referred to the possibility that the Court might not have anything to do for some time to come. I drew some assurance from the early history of the Supreme Court of the United States. You will recall that when it met at Philadelphia in February, 1790, it had no cases to hear. It met again in August, 1790—no cases; in February, 1791—no cases; in August, 1791—no cases; in February, 1792—no cases. It was not until the sixth meeting of the Supreme Court of the United States that it heard its first controverted case. So I thought in 1922 that it might be some time before the new International Court would have any cases to be heard. But, contrary to my expectations, it was

necessary for the Court to hold two extraordinary sessions in the first two years, in order to take care of its business. And in this period it has handled nine outstanding, important international questions; not the kind of questions about which men go to war—one does not need to over-emphasize the place of law in international society, for we are all familiar with the limitations on the serviceability of law in national society—but all questions of outstanding importance.

The first three questions related to the functioning of the International Labor Organization that was set up by the Treaties of Peace, and all of them came up on requests for advisory opinions from the Council of the League of Nations.

Advisory Opinions of the New Court.

I want to stop a moment to comment on the two-fold jurisdiction of the new International Court. It has a jurisdiction in controverted cases and a jurisdiction to give advisory opinions to the Council and Assembly of the League of Nations. Some people in this country have not understood the latter kind of jurisdiction, and they have criticised the Court as if it were the "private attorney" of the League of Nations. Of course all of us in Massachusetts are thoroughly familiar with the giving of advisory opinions as a part of the judicial function. According to my count, the Justices of the Supreme Judicial Court of Massachusetts have given about one hundred and forty advisory opinions since 1780, when such jurisdiction was conferred upon them. And this query has occurred to me. The constitution of Massachusetts is older than the state constitution of any other state. Can it be that the constitution of Massachusetts has held its ground partly because of the jurisdiction of the Justices of the Supreme Judicial Court to give advisory opinions on constitutional questions? I do not know, but I think that would offer a very interesting inquiry.[1]

The supreme courts of various other states in this country, or the judges thereof, have jurisdiction to give advisory opinions. Alabama, by statute, has just conferred such jurisdiction on the judges of her Supreme Court. In many states lawyers come before the court to argue the question that is presented for advisory opinion. I cannot quite understand why it is said by the Massachusetts justices, as it has been said, that the advisory opinions here are

[1] See 2 Mass. Law Quarterly (May, 1917) pp. 542 ff.

necessarily given without argument of counsel.[2] In Delaware, a few days ago, the judges sent out notice to the lawyers of the state that a certain advisory opinion had been requested, and requested that counsel come and argue the question involved.[3] And in Colorado it is customary for the Court to hear argument before giving an advisory opinion.

The Permanent Court of International Justice has been requested to give eight advisory opinions in these two years. With reference to all eight, it has heard argument by every state or organization that asked to be heard. On receiving a request for an advisory opinion, the Court sends notice of the request to all the fifty-four members of the League of Nations, to the United States, Ecuador and the Hedjaz, and to other governments if those governments are especially concerned; and it allows any state in the world to appear to argue with reference to an advisory opinion, just as any state may appear as a party before the Court.

The Nine Questions Before the New Court.

The first three opinions, relating to the functioning of the International Labor Organization, were readily accepted and acted upon. The fourth opinion relates to a nationality question that arose between Great Britain and France in Tunis and Morocco. I have here the record of briefs, arguments and documents with reference to that fourth advisory opinion. Such a record has been published for all the opinions rendered by the Court. The fifth opinion related to a dispute between Finland and Russia, and there the Court refused to hand down any opinion, because Russia would not appear to argue the case;[4] a very interesting commentary, I think, on the nature of the advisory opinion and the extent to which this jurisdiction leaves the Court an independent judicial tribunal. The sixth advisory opinion related to protection to German colonists in Poland. The seventh opinion related to Poland's refusal to confer Polish nationality on German colonists who were inhabiting the territory that was taken over by Poland. The eighth advisory opinion, handed down last December, related to a boundary question between Poland and Czecho-Slovakia.

Only one contested case has come before the Court, and that was the Kiel Canal case which came up last summer, between Great

[2] 190 Mass. 611. In at least one case, however, in 1825, the Justices did hear argument. See *Adams* v. *Bucklin* (1828) 7 Pickering 121, 126. In at least one recent instance, the Justices have received briefs from counsel.

[3] In re School Code of 1919, 30 Del. 406.

[4] Cf., the refusal of Massachusetts Justices in 1914 to give an opinion requested, 217 Mass. 607.

Britain, France, Italy, Japan and Poland on the one hand and Germany on the other hand; the Court finally gave judgment against Germany for 140,000 francs, having found that Germany's refusal to permit a vessel to pass through the Kiel Canal was an improper refusal under the Treaty of Versailles. In that case it is to be noted that the German government appointed a judge to sit on the Court *ad hoc*. They appointed Professor Walter Schucking, professor of law at the University of Berlin, a very good man.

In these nine cases, then, we have a record which, in my judgment, constitutes a big contribution to international law. I brought in the opinions in order that you might see the form in which they are published. They are available through the World Peace Foundation here at 40 Mt. Vernon Street, Boston.

How has the work of the Court been received by our profession? So far as my contacts with lawyers of various countries go, they are everywhere pleased and encouraged by the work of the Court. They are satisfied that we have at last established an institution which may make a great contribution to the future of international law. They regard the new Court as filling a need in our international society that has been felt for half a century.

The United States and the Court.

The President and Secretary of State have proposed that the United States should become a party to this treaty setting up the Court. I cannot see any good reason for our not becoming a party to that treaty as they suggested. The only reason that seems to have lingered as a consequence of the discussion is that the Court has somehow a connection with the League of Nations. Well, in my judgment it would be impossible to establish international machinery of this kind in a world where fifty-four peoples are joined together in a League of Nations, and have it wholly unconnected with that machinery. But so far as there is a connection between this judicial machinery and the political machinery of the League of Nations, I submit to you that it is much the same kind of connection that there is between the Supreme Judicial Court of Massachusetts and the Governor and Legislature of this Commonwealth. The money to pay the expenses is collected through a money-collecting machinery in Geneva. That is true. The judges are elected by the Council and Assembly of the League of Nations in Geneva, in which the United States could be represented. During the last six months the United States has been represented at five

different international conferences under the auspices of the League of Nations in Geneva. We would simply be carrying that representation one step further if we sent a representative to Geneva once in nine years to elect the judges of this Court. And, indeed, Americans are already participating in the election of the judges, for the judges are nominated in the first instance by the members of the Permanent Court of Arbitration. The American members of the Permanent Court of Arbitration—Messrs. George Gray, John Bassett Moore, Elihu Root and Oscar Straus—refused to make a nomination in 1921. They said in effect, "We are not competent to make a nomination." In 1923 the same men, acting under the same treaty, made a nomination. In other words, they discovered in the interim between the election of 1921 and the by-election of 1923 that they were competent. In the last election, then, there was American participation.

My own feeling is that the laweyrs of this country who have endorsed this new Permanent Court of International Justice through the American Bar Association and through many State Bar Associations, are going eventually to insist that the United States shall take its part in maintaining and supporting this machinery. To take part it is not necessary for the United States to obligate itself to submit any cases to the Court. It is not necessary for us to do more than obligate ourselves to pay a part of the expenses of the Court. It is important to observe that, even without taking the action of becoming a party to that protocol, we could take any case before the Court today. The situation will not be vastly changed if the United States takes the action proposed, for we would then be free, as we are now free, to take a case before the Court or not, as we liked. The only difference would be that we would then be paying a part of the expense of this undertaking, and we would be contributing our moral influence to strengthening the forces of law and order in international society.

Whether the United States does anything about it or not, I venture the prediction that the Court is going on, that the judges will continue to sit, that they will come together at The Hague on the fifteenth day of every June and discharge their functions in an independent, dignified professional spirit. The world in which we live is a world which needs their assistance. So that I predict that the Court will go on making its contribution to international law, whether the United States takes any action or not. But I hope its record will be made with our collaboration rather than without it.

THE VOTE OF THE BOSTON BAR ASSOCIATION.

A postal ballot of members of the Bar Association of the City of Boston was recently taken on the following resolution:

> RESOLVED: That the Bar Association of the City of Boston favors as a general principle the adjudication of international disputes and favors the proposal that the United States adhere to the Protocol establishing the Permanent Court of International Justice at The Hague, with the reservations proposed by Secretary Hughes and in the manner set forth by the late President Harding in his message to the Senate of February 24, 1923.

The result of this ballot was 408 Yes; 31 No. The Executive Committee of the Massachusetts Bar Association has taken no action on this matter, but following information which was submitted to the members of the Boston Association is here reprinted.

F. W. G.

THE HARDING-HUGHES RESERVATIONS.

Extract from letter of the Secretary of State to the President, February 17, 1923.

I beg to recommend that, if this course meets with your approval, you request the Senate to take suitable action, advising and consenting to the adhesion on the part of the United States to the Protocol of December 16, 1920, accepting the adjoined Statute of the Permanent Court of International Justice, but not the optional clause for compulsory jurisdiction; provided, however, that such adhesion shall be upon the following conditions and understandings to be made a part of the instrument of adhesion:

I. That such adhesion shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the Covenant of the League of Nations constituting Part I of the treaty of Versailles.

II. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other states, members respectively of the Council and Assembly of the League of Nations, in any and all proceedings

of either the Council or the Assembly for the election of judges or deputy judges of the Permanent Court of International Justice, or for the filling of vacancies.

III. That the United States will pay a fair share of the expenses of the court as determined and appropriated from time to time by the Congress of the United States.

IV. That the Statute for the Permanent Court of International Justice adjoined to the Protocol shall not be amended without the consent of the United States.

RESOLUTION PASSED AT ANNUAL MEETING OF AMERICAN BAR ASSOCIATION AT MINNEAPOLIS, AUGUST, 1923.

Resolved that the American Bar Association join in what it believes to be the wise judgment of the American people, that the United States ought to become one of the supporters of the Permanent Court of International Justice at The Hague, and that our Government should therefore adhere to the Protocol establishing the Court in the manner set forth by the President in his message to the Senate of February 24, 1923.

REPORT OF THE COMMITTEE ON INTERNATIONAL LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK.

TO THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK:

The Committee on International Law recommends to the Association of the Bar of the City of New York, the adoption of the following resolution:

RESOLVED:

"The Association of the Bar of the City of New York joins in what it believes to be the wise judgment of the American people that the United States ought to become one of the supporters of the Permanent Court of International Justice at The Hague and that our Government should therefore adhere to the protocol establishing the court in the manner set forth by the President in his message to the Senate of February 24, 1923."

In the opinion of your Committee this court in every material respect conforms to the project urged upon the Second Hague Conference in 1907 by the American delegation under the express in-

structions of the American Government and powerfully maintained by Joseph H. Choate as head of the delegation.

It is based upon the example of the Supreme Court of the United States and is intended to apply to international controversies the same methods of hearing and decision which that court has applied to controversies between the states of the American union.

It responds to the established and unvarying policy of the United States which found early expression in the Jay treaty with Great Britain of 1794 and which has been illustrated by scores of treaties and repeated resolutions of Congress and by declarations and acts of substantially every administration for more than a century in favor of the peaceful settlement of international controversies.

The creation of the court is a moderate step in progress in pursuance of that established American policy and along the line urged upon the other nations by the Government of the United States.

Such a permanent Court was proposed by the United States to the First Hague Conference in 1899 under instructions to the American delegation by Secretary Hay in the Administration of President McKinley.

The instructions to the American delegates in the second Hague Conference of 1907 contain the following paragraphs:

If there could be a tribunal which would pass upon questions between nations with the same impartial and personal judgment that the Supreme Court of the United States gives to questions arising between citizens of the different states, or between foreign citizens and the citizens of the United States, there can be no doubt that nations would be much more ready to submit their controversies to its decision than they are now to take the chance of arbitration.

It should be your effort to bring about in the Second Conference a development of The Hague tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation and who will devote their entire time to the trial and decision of international cause by judicial methods and under a sense of judicial responsibility. These judges should be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented. The court should be made of such dignity, consideration and rank that the best and ablest jurists will accept appointment to it and that the whole world will have absolute confidence in its judgment.

Under these instructions Mr. Choate for the American delegation introduced the project which has now ripened into the existing Court of International Justice.

Upon the results of this American initiative President Roosevelt giving an account of the Second Hague Conference in his message to Congress of December, 1907, said:

Substantial progress was also made toward the creation of a permanent judicial tribunal for the determination of international causes. There was very full discussion of the proposal for such a court and a general agreement was finally reached in favor of its creation. The conference recommended to the signatory powers the adoption of a draft upon which it agreed for the organization of the court, leaving to be determined only the method by which the judges would be selected. This remaining unsettled question is plainly one which time and good temper will solve.

After the Hague Conference the American Government again took the initiative toward the establishment of such a court in the Administration of President Taft under the direction of Secretary Knox, who said in an official note of October 18, 1909:

It has been a subject of profound regret to the Government and people of the United States that a court of arbitral justice composed of permanent judges and acting under a sense of judicial responsibility representing the various judicial systems of the world and capable of insuring continuity in arbitral jurisprudence was not established at the Second Hague Peace Conference and the United States likewise regrets that the composition of the proposed court of arbitral justice has not yet been effected through diplomatic channels in accordance with the following recommendation of the conference:

> "The conference recommends to the signatory powers the adoption of the project hereunto annexed of a convention for the establishment of a court of arbitral justice and its putting into effect as soon as an agreement shall have been reached as to the choice of judges and the constitution of the court."

A careful consideration of the project and of the difficulties preventing the constitution of the court owing to the shortness of time at the disposal of the conference has led the Government of the United States to the conclusion that it is necessary in the interest of arbitration and the peaceful settlement of international disputes to take up the question of the establishment of the court as recommended by the recent conference at The Hague and secure through diplomatic channels its institution.

For practically all the nations upon whom the United States urged the establishment of such a court as this while Roosevelt was President, the then unsettled question has been settled by time and good temper as Roosevelt prophesied. The question now is whether the United States shall repudiate its own policy when other nations have accepted it.

Respectfully submitted,

ELIHU ROOT, *Chairman*	MORGAN J. O'BRIEN
FRANK W. M. CUTCHEON	ALTON B. PARKER
ABRAM I. ELKUS	FRANK L. POLK
JAMES W. GERARD	MUNROE SMITH
GEORGE L. INGRAHAM	CHARLES H. STRONG
JOHN G. MILBURN	GEO. W. WICKERSHAM

Dated February 28, 1923.

DECLARATORY JUDGMENTS AS TO WILLS.

Section 145 of the New York State Surrogate's Act contains the following paragraph:

> "If a party expressly puts in issue in a proceeding for the probate of a will the validity, construction, or effect of any disposition of property, contained in such will, the surrogate may determine the question, upon rendering a decree, after notice given in such manner as the surrogate directs to all persons interested who do not appear on such application in person or by attorney; or, unless the decree refuses to admit the will to probate, by reason of a failure to prove any of the matters specified in the preceding section, may admit the will to probate and reserve the questions so raised for future consideration and decree."

This is reported to be working well in New York, and it is suggested that the equivalent might safely be passed independent of other provisions for Declaratory Judgments.

Surely when opposition to a will depends upon its meaning there are times when the court could wisely use discretion to construe it at the time of probate.

R. W. H.

DELAYS IN REFERRED CASES.

As a rule in civilized communities the state establishes courts to which the citizen may resort to settle disputes with his neighbors, and these courts are free. The state pays the judges and all the other expenses of maintaining the tribunals, and frequently furnishes a public stenographer to make a record of the proceedings. The litigant is expected to pay the expenses of his counsel and of producing his witnesses, besides some insignificant costs, and the theory is that each case will be tried in its turn, and decided promptly. From the days of Magna Charta the delay and the denial of justice have been placed in the same category.

Today, however, our practice and this theory are widely at variance. Our judges are apparently overworked and wholly unable to dispose of all the business which comes before them, though the number of sessions devoted to the trial of jury cases was never greater. In 1873 when the Supreme Court of Judicature Act was passed in England, it provided for thirty-one judges who should dispose of substantially all the litigation arising in England and Wales, with a population of more than twenty-two millions. At that time Massachusettts, with a population of less than a million and a half, had on the Supreme Bench seven judges, and on the Superior Bench ten judges.

It was pointed out then by a writer in the *American Law Review* that "if the courts of Massachusetts were transferred to England with a corresponding increase in the number of judges, there would be in the Supreme Court 105 judges and in the Superior Court 150."

Since then our population has increased, but our judicial force has increased much more in proportion, since we now have thirty judges in our Superior Court, and yet the congestion of business and the delay in disposing of cases has not been reduced. For some time, indeed, the judges of both Supreme and Superior Courts have referred the most important cases to auditors and masters often with only a slight examination of what is involved, upon learning from the statement of counsel or otherwise that a trial must be long, or in a word, that "It is a case for a master." Now in some cases the Court declines to hear a case where facts are contested and sends it at once to master or auditor. This done, the

court washes its hands of the case, and relies on counsel to bring it up whenever any further action by the court is desired.

The result is that at any given moment a large mass of important litigation, involving large amounts of money, is in the air. Where a case is tried in court, a lawyer knows that he must be ready when the case is called, no matter at what personal inconvenience, and must stay at his post till the trial is finished. When a case is before a master he feels that it is to be tried when luxuriously convenient to everyone, master, counsel and witnesses, and as a result years go by while the case hangs. Hearings are not appointed because no time can be fixed by agreement, or when appointed, are easily postponed. Any excuse is enough, and the master cannot be expected to force the attendance of parties, for to make himself disagreeable by so doing is to render it at least doubtful whether he will be selected as master again.

The parties suffer from ruinous delays, and are forced to make unjust settlements or to abandon hope of justice. I have in mind a case before an excellent magistrate where the argument was completed some three years ago, and no decision has been rendered. Injunctions against strikers have been violated, and the question of violation referred to a master on a motion to commit for contempt, and no report from the master rendered for more than a year, which weakens the Court in public estimation.

Delay is often a complete defence against a plaintiff whose means are slight, and delay is assured if a busy lawyer with many engagements is employed, as he can hardly be forced to a hearing when he can plead an engagement in some other trial, and it is very easy to arrange his engagements as he pleases.

Nor is this all. The litigant whose case is tried by a court has judicial service of a high class. His judge is a man selected for the bench on account of his ability and character, he is trained by experience for his work and is removed from the influence of any personal consideration which might affect a man whose position was not assured,—in short, he is as impartial a tribunal "as the lot of humanity will permit." When a master is to be selected, the client naturally wants as good a judge, but the court only allows the state to pay the master so small a remuneration that lawyers in active practice cannot afford to serve. Where such a man is required the parties have to agree that they will pay him more, and frequently also pay a stenographer to take the evidence. The master is apt to require this, as he does not want to take

notes himself. This means a daily expense to the parties, and if the hearing is prolonged, this expense may be very large, an expense not incurred if the Court tries the case.

In a word, the courts of Massachusetts cannot do the work which they were created to do, and the tribunals which they have instituted to do it are inefficient and expensive to the litigant. To spend years and hundreds of dollars in seeking justice is not an attractive prospect, and we can hardly expect the community to be satisfied.

The example of England shows us that better results are possible, and the constant increase of our judicial force does not secure them. What is the remedy?

Auditors and masters are only themselves new judges, selected at random and proceeding in a desultory and ineffective manner. If we want more men to do their work, why not have judges who shall hold court like other judges, having a regular docket, regular hours, and trials continued to the end? It would rarely happen that they had cases lasting longer than some jury trials, and they would doubtless dispose of business as fast as the judges used to when they had time to try cases. Call them judges, masters, or what you will, but let their courts be a regular part of our judicial system, and conducted as other courts are.

If they are made sessions of the Superior Court, certain judges might be assigned to serve in these sessions regularly, or they might change as they do now, but in any event all questions relating to the trial of such cases as these sessions would undertake should be dealt with in those sessions. In counties where several sessions are not needed, a judge could hold Court for such matters as required.

If for any reason the idea of having permanent officers to try these cases is not adopted, and the present system of turning cases out of court is retained, a docket should be kept of all cases sent to masters, and it should be the duty of the court to keep the run of them, and from time to time ask for a report of progress, and make rules to expedite trial.

To avoid the delays caused by conflicting engagements of counsel, we must come to the English system, and require counsel either to attend when a case is tried in which he has accepted a retainer, or to provide some other lawyer to take his place. Between courts that cannot find time to try, and lawyers who are too busy elsewhere,—that is between the courts and their officers,—the citizen

suffers, and it is the duty of Court and Bar to see that this suffering is reduced to a minimum. There are competent lawyers enough to do the work if they are given the opportunity. Indeed, if the courts would abandon their present practice of turning the whole case over to a master and were to revert to the old practice, much good would result. The recommendations made in January, 1921, by the Commission of which Judge Sheldon was chairman and George R. Nutter and Addison L. Green, Esquires, were members, suggest important changes in practice which may well be quoted.

> "While there are some cases of so complicated a character, and the hearing of which necessarily occupies so much time that the necessities of the courts in arranging their work, as well as the interests of the parties, are better served if the whole case is referred to a master, we believe the general policy of keeping the court in closer touch with the case to be sound, and that as far as practically possible, particularly in cases in equity, the court should hear and decide the main issues in the case if they can be separated from the taking of accounts and other matters of that character, the necessity for taking which depends upon the main issue. For instance, in a case containing allegations of fraud, the question of fraud, if it is not too involved, might be heard and decided by the court, if possible, and then, if the taking of an account is necessary after such decision, the taking of it should be referred to a master.
>
> "The court might well consider some method of requiring periodical reports from masters or auditors of their action and the progress of the case. We believe that such practice would keep the court more closely in touch with the proceedings. We see no better method of overcoming the present easy-going practice, under which the convenience and agreements of counsel control the progress of the case to such an extent that a master or auditor is practically helpless."
>
> "(4) *The Practice of defining Issues.*—It has been said upon the best authority, and it is generally agreed by those who have applied, or observed, the practice in the English and in some of the Canadian courts, that one of the most effective methods of despatching business and avoiding unnecessary waste of time, money and effort in the trial and hearing of cases is the system of preliminary examination of parties or their counsel, either before the court or before an official master, to ascertain definitely what are the actual points of dispute between the parties and what questions are undisputed, so that the real issues in the action

may be ascertained in advance and the trial directed to the decision of those issues. Such a preliminary investigation often results in the settlement of a case without trial.

"Under the English practice, the process for such investigation in the highest courts is called a "summons for directions," and the parties or their attorneys appear before a permanent official, called a master, or, in the county courts, before the "registrar," who settles all interlocutory matters, gives directions as to the production of documents and as to what documents, if any, should be protected from inspection; and as to the issues or questions upon which the case is to be sent to trial. Thus much time is saved when it comes to trial because of the fact that the case has been brought down to its proper limits, and that taking of unnecessary evidence and the expense of preparing for the taking of such evidence, because of uncertainty, is avoided."

The evils of the present situation are clear and have long been recognized by the community as well as by the Bench and Bar. Some remedy must be found, and it is clear that it should be found promptly for the present conditions have endured too long.

MOORFIELD STOREY.

EDITOR'S NOTE.

Mr. Storey's comments deserve careful consideration and there is much room for improvement but, in fairness to the courts, it should be publicly understood that (as pointed out in this magazine for November, 1922, p. 64), the Superior Court, under the leadership of Chief Justice Hall, has begun to deal with this subject in such a way as to reduce delays in referred cases in future. In the Federal courts, a rule was adopted about a year ago calling for periodical reports of progress from masters in referred cases and requiring counsel to proceed with hearings or substitute other counsel when other court engagements conflicted. We understand that this rule is being enforced. The Amendment, of Oct. 6, 1923, to Rule 30 of the Superior Court as to auditors appears on the next page.

The change from a dilatory to a more effective practice in such matters is always a gradual one, in view of the habitual inertia of lawyers who do not like to be disturbed in their habits. Courts need a co-operative spirit at the bar to bring about improvements. But things are moving in Massachusetts, as they are all over the United States, toward improved administrative conditions. Mr. Storey's comments may help the work along. The Judicial Council may well consider whether the substance of the following rule might not be applied to equity practice with good results. Such consideration might help the Supreme Judicial Court which has the making of the Equity Rules. F. W. G.

THE AMENDMENT OF OCTOBER 6, 1923, TO RULE 30 OF THE SUPERIOR COURT AS TO AUDITORS' HEARINGS AND REPORTS.

"If the final report of the auditor is not filed on or before the thirtieth day after the day for the completion of hearings set by the rule to the auditor, he shall on said thirtieth day file with the clerk a statement in duplicate stating (1) whether hearings are closed, (2) if not closed, the reason therefor, (3) the date of the last previous hearing, (4) his estimate of the probable length of time needed for the completion of the hearings and the preparation of his final report; and, if hearings have been closed, (5) the date of the close of hearings and his estimate of the time needed for the preparation of his final report with his reasons for the existing delay in filing the report. He may include such other matter or motion as he deems proper.

No bill for the auditor's services shall be allowed before the statement called for by this rule is filed. The clerk on the filing of such statement shall forthwith file one of said duplicates with the papers in the case and transmit the other to the justice who appointed the auditor, and he shall, furthermore, notify counsel of the filing of said statement.

It shall be the duty of the justice receiving said statement within ten days thereafter to make such order for the speedy completion of hearings and the preparation of the final report as justice requires. If such statement is received by the justice in a period when he is not assigned to sit, he shall make such order within ten days after the date of his resuming his sittings.

Hearings, once begun, shall proceed as nearly as possible on consecutive days to completion. Engagements in actual hearing before an auditor or master shall have the standing of an engagement in actual trial before the court. No other protective order for counsel, auditor or master shall be made."

NEWHALL'S "SETTLEMENT OF ESTATES".

(*Reprinted from the Harvard Law Review for March, 1924.*)

"The second edition of Mr. Newhall's very clear statement of the Massachusetts Probate Law—the best exposition of that law—adds to the first edition of 1915 eight years of legislation and the development of twenty-five volumes of the reports. The recent publication of the General Laws has made a new edition necessary for a working manual. The text has been lengthened by the addition of chapters on the Federal Estate Tax, the Income Taxes, and Appeal and Error. Notes, absent in the earlier edition, now include the development of minor points and all the important Massachusetts decisions through volume 244.

"We have nothing but good to say of this book.

J. W."

ADVERTISING BY BANKS AND TRUST COMPANIES FOR LEGAL BUSINESS.

(From the Bar Bulletin of the Boston Bar Association for April, 1924.)

"This has been discussed in different parts of the country. Many lawyers object to the advertisements of corporations for executorships or trusteeships as unwarranted and unfair. A bill was introduced this year to make it a criminal offence, clearly too drastic a method of dealing with the subject. Financial institutions, properly organized, have a legitimate function to perform for those members of the community who wish to utilize their services in this way. In their desire to get such business, they ought not to disparage similar services of competent and trustworthy individuals, whether lawyers or laymen, in a similar field. There are many cases in which individual fiduciaries are preferable to a corporation.

"There must be a sound standard as to the proper methods of inviting such business applicable equally to individuals and to corporations. The courts can establish this standard if given the opportunity. The Committee on the Amendment of the Law of the Association drafted the following bill, which was reported by the Judiciary Committee in place of the proposal for criminal penalties already referred to.

"Chapter two hundred and twenty-one of the General Laws is hereby amended by inserting after section forty-six thereof the following new section:—

Section 46 A. No corporation authorized to act as executor, administrator, or trustee in this commonwealth shall solicit employment in any of said capacities either by advertisements of such a character or by such other means as would, if employed for a like purpose by a member of the bar, be a violation of the standards of professional conduct recognized and enforced by the courts of this commonwealth. The attorney general may upon the relation of any bar association incorporated in this commonwealth bring an information in the nature of a bill in equity to enforce the provisions of this section against any corporation violating the same."

"The House rejected the bill, probably because of a misunderstanding of its purpose. Analysis will show that it is drafted with exceptional care and that it deals with a difficult situation

in a manner likely to produce the soundest results. The more study given to it before next year, the better, in order to avoid attempts for more drastic and less carefully thought out legislation."

The foregoing statement is quoted from the "Bar Bulletin" of the Bar Association of the City of Boston. To supplement it, the Editor has received from William G. Thompson, Esq., the draftsman of the proposed act (H. 1428 of 1924), the following memorandum which will help those interested in considering it.—ED.

MEMORANDUM IN SUPPORT OF HOUSE BILL 1428.

1. The effect of permitting trust companies and banks to act as executors, administrators, and trustees, and to solicit employment in those capacities by advertisement, has been, according to the statements of representatives of certain large Boston trust companies greatly to increase the number of wills made, and what is more important, to increase the number of trusts contained in wills. It was antecedently probable that this would be the result, and there is no reason to doubt the statements that the result has actually occurred. This means that a very large amount of personal property has gradually been passing under the control of the trust companies and banks in Massachusetts. I have not the exact figures, but I should suppose they could hardly fall much short of a quarter of a billion dollars. This means, of course, that the control of many industrial and other corporations in which the testators held stock is gradually passing into the hands of a few corporate trustees. It is also a fair inference that the trusts will continue for the longest period allowed by the rule against perpetuities. Also the market for securities in which the corporate trustee may happen to be interested is greatly enlarged. It is only fair to say, however, that some of the trust companies do not encourage transactions between their trust and bond departments. But the policy of encouraging the tying up of such vast amounts of personal property for a long time and vesting the control in the hands of a few corporations is at least open to question.

2. The companies have naturally felt that statutory authority to do the business in question carried with it the right to solicit such business, either by advertisement or otherwise; and they have proceeded freely to exercise this right both by personal solici-

tation of possible testators through their employees, and by advertisements in the newspapers and magazines. These advertisements have skillfully pointed out the advantages of corporate trusteeships. Sometimes they have gone beyond this and have suggested the disadvantages of individual trusteeships, including the possibility of loss by embezzlement, incompetence, death of the selected trustee, etc. In other words, the advertisements have amounted to propaganda stating only one side of a plainly debatable matter. The truth is, of course, that whether in any particular case an individual or a corporate trustee is better depends on a variety of circumstances, and that no general rule can be laid down. But owing to the fact that lawyers are under a traditional code forbidding advertising, and that nobody else has any interest in presenting the other side, the public have never heard the other side, and so far as they believe the advertisements, would conclude that there was no other side. The public has, therefore, been misled. Here again we have a result contrary to sound public policy. The public ought to know the truth on an important subject like this.

3. Although by existing law the companies are forbidden to employ their own lawyers to draw wills for prospective testators brought in by their advertisements, and although many of the companies seem to be living up to this law with reasonable fidelity, yet it is a law easily evaded. But in cases where the law is observed, the practical result is not very different from what it would be if the law were not in existence at all. For many of the persons who call upon the companies in response to the advertisements say, when advised by the trust officer to employ their own lawyer to draw a will, that they have no lawyer. They ask for a list of lawyers whom the trust company can recommend. The trust officer naturally gives them a list of a few lawyers whom he happens to know or who are friends or acquaintances of the counsel of the company. These lawyers draw the wills, of course making the trust company trustee. So much was admitted by the representatives of the trust companies already mentioned. The result, of course, is that a small group of favored lawyers are indirectly getting the benefit of expensive advertisements paid for out of commissions obtained by the trust companies for acting as executor, administrator, or trustee, and that business which might otherwise be fairly evenly distributed among the Bar is concentrated in these groups. It is probable that Probate practice has thus been diverted to a very considerable extent from lawyers who were entirely competent to

do it. This is a result unfair to the lawyers, and has caused resentment and hard feeling, especially in view of the fact that the advertisements occasionally contain slurs upon the honesty and competence of the legal profession, which there seems to be no way of answering.

The foregoing are the principal arguments in favor of some legislation. The prohibition against advertising by lawyers exists simply in the form of codes of ethics which have never been validated by any decision of the Supreme Judicial Court. There seems to be no doubt that some forms of advertising are legitimate, as, for instance, the insertion of cards in the books of collection agencies, lawyers' lists, etc. There is no doubt also that some other forms of advertising are improper and against the public interest. It would appear that acting as administrator, executor, and trustee, and drawing the papers incident to such activities, is partly a business and partly a professional occupation. It partakes of both characters. If the Supreme Court should hold that an individual lawyer might properly in some form advertise his capacity and desire to act as executor, administrator, or trustee, probably few individual lawyers would think it worth while to do so, as such advertisements would repel many people who have money to leave. But if this bill passed, the present rather feeble organization of individual trustees existing in Boston (and similar organizations that might be formed elsewhere) might as an organization publish fair and carefully worded advertisements setting out the other side of the question, not in the interest of that organization or of any particular individuals but of individual fiduciaries in general, so that the public might have a fair basis for judgment and bar associations might well publish occasional statements on the subject. Any case that might be brought against a trust company would necessarily determine pro tanto the limits of permissible advertising by lawyers.

The restrictions in the bill about the bringing of informations are in the nature of precautions. Individual lawyers ought not to have the right to set in motion litigation against trust companies. Nor ought voluntary and transient organizations of lawyers. If such litigation is to be started it should be instituted after hearing and by the executive body of an incorporated and responsible bar association, like the Boston Bar Association, the Massachusetts Bar Association, or any county bar association which might see fit to become incorporated. But no bar association should be the

final judge even of the question whether litigation should be started. It should be discretionary with the Attorney General whether to act upon the relation of the bar association or not and the bill makes it so. On the other hand, it would seem unwise to give any Attorney General the right of his own motion, without any request of a bar association, to institute litigation against trust companies. He should have a veto, but only a qualified initiative. The bill covers that point.

Some of the larger trust companies do not object to legislation substantially in the form of the bill proposed by the Committee on the Amendment of the Law of the Boston Bar Association as a substitute for House Bill 96. The wisdom of opposing any restrictive legislation at all may well be doubted.

W. G. T.

EDITOR'S NOTE.

Since the above was ready for the press, the Editor has received the following communication and enclosure, which illustrate the problem:

"DEAR SIR—I enclose advertisement cut from a morning paper which is typical of the scare-head advertisements which have appeared recently in the papers.

"At this writing I can recall two instances where a trust company as trustee has lost substantial amounts. In one instance the sum of $10,000 on a forged mortgage and the other a much larger amount on unwise investments.

"I presume that if a firm of attorneys or group of attorneys inserted an advertisement in the paper setting forth that a trust company had lost a substantial amount on account of the negligence of its employees and setting forth the advantages of an individual as executor and trustee and the disadvantages of the trust company such action would be considered unprofessional.

"The care of estates is a legitimate field of activity for the legal profession. If the trust companies are allowed to compete in this field why should not the same standards of ethics be applied to both the trust companies and the legal profession so that the legal profession may meet the competition on equal terms?"

The enclosed clipping from a Boston newspaper was as follows:

"FIFTY THOUSAND DOLLARS LOST TO THE RIGHTFUL HEIRS.

"**An aged Trustee, mentally and physically unable to care for** the estate left in his hands, objects to being removed in favor of

some other member of the family, and in consequence more than $50,000 was lost to the rightful heirs.

"**At his death a family settlement was made and after careful** consideration the ——— Trust Company was appointed Trustee of the Estate. Now the beneficiaries are receiving their payments at regular intervals and like many who have suffered by mistakes they have appointed the ——— Trust Company to carry out the provisions of their wills.

"**When you appoint the ——— Trust Company the execu**tor or trustee of your will, you give your heirs protection founded on financial responsibility, experience, impartial view-point, assured existence, sound financial judgment, and legal knowledge.

"It has taken care and wisdom to build your estate—it will require the same qualities to preserve it—appoint the ——— Trust Company your executor.

——— TRUST COMPANY

Member Federal Reserve System."

The full-page advertisement of the "Trust Company Division of the American Bankers' Association" on page 10 of "The American Review of Reviews," and that in the "World's Work" for April, 1924, seems open to criticism in the light of the foregoing discussion.

F. W. G.

(Copyright New York Tribune Syndicate, Reproduced by permission.)

(Copyright New York Tribune Syndicate, Reproduced by permission.)

WHY THEY CALL OURS A "SELF-GOVERNMENT?"

THE MASSACHUSETTS REPORTS.

Advance Sheets.

In the December number reference was made to the new and convenient plan of Advance Sheets of Massachusetts Reports supplied by The Fort Hill Press, within 48 hours of the decisions, at $12.00 a year. More subscribers are needed if this service is to be continued. Subject-digest and introductory statements by the Reporter have now been added as well as periodical indices.

The Preparation of the Reports by Ethelbert V. Grabill, *Reporter of Decisions.*

Volume 245 of the Massachusetts Reports, the first published by Samuel Usher (The Fort Hill Press), who last June was awarded the contract for three years by the attorney general, the secretary of the commonwealth and the reporter of decisions, acting under Resolve 30 of the Legislature of 1923, is now distributed. This makes a suitable occasion for comment on the Reports as now published.

Mr. Usher is acting under two contracts, one which awards him the contract of printing the Reports at a certain lump sum to be paid by the Commonwealth in accordance with certain carefully drawn specifications relating to the manner and time of performing his contract, and one which permits him to act as agent for the Commonwealth in the sale and distribution of the volumes.

It is hoped that the first contract will result in volumes of convenient size and durability, published at regular intervals and with reasonable promptness. So far this result has been attained. Volume 245 is about two-thirds the size of the preceding volumes, although it contains the same amount of matter. Its print is clear; its arrangement is convenient; its binding is durable, and the volume, without other help, will remain open at any place at which it is opened.

Some comment may now be made as to the other changes which gradually have been taking place in the Massachusetts Reports.

Headnotes. The present reporter uses three styles of headnote. Wherever possible a short propositional headnote is employed. Such

is the first headnote in *Walsh* v. *Adams*, 245 Mass. 1. Where such a headnote is not possible, but it is necessary to make a more or less detailed statement of facts, a form of headnote is used which makes such detailed statement of facts and then, in numbered paragraphs thereunder, sets forth the rulings of law by the court based on that statement of facts. This enables the reader first to read the numbered paragraphs. If he does not find therein a point of law for which he is searching, he does not need to peruse the detailed statement of facts which precedes. The third type of headnote is used in a class of cases which often arise in the determination of exceptions or of an appeal based upon a lack of evidence warranting a finding or a verdict; for instance, in appeals in equity based solely on whether or not the facts warrant a finding of fraud, at the trial of issues where the question is whether the facts in evidence warrant a finding of undue influence or fraud, etc. Such cases seldom, if ever, involve any real question of law, and in such cases the reporter is contenting himself with a headnote which in effect merely calls the reader's attention to salient characteristics of the case in a somewhat summary manner. Such a headnote is the last one appearing in *Tuttle* v. *Corey*, 245 Mass. 196. The reporter feels that if a long statement of facts must be read by the searcher for rulings of law, it is better that he read them in the large print in the opinion rather than in the small print of the headnote. The style of headnote used in these cases is merely sufficient to draw the reader's attention to the fact that he may need to read the more detailed statement in the opinion. Occasionally variations from the rules of conduct thus adopted by the reporter are necessary and occur. His aim is, however, to stick quite strictly to the rules thus adopted by him.

Statement of case. The present reporter is of the opinion that no report should appear with merely the opinion and headnotes. There is, therefore, always a statement following the headnotes and preceding the opinion giving facts which the practicing attorney very often finds helpful. This statement is more or less extended in accordance with the requirements of the case. The reporter's hope is to make an exact picture of the case as it was in the court where the rulings of law excepted to or appealed from were made, and as it came to the full court, more or less detail being brought out in accordance with what is needed to make clear the ruling of law excepted to in the lower court and determined in the Supreme Judicial Court.

Index. The bar is not generally aware that beginning with volume 210 a radical change in the indices in the current volumes occurred. Previous to that volume the indices were made up by having transferred to them bodily the headnotes as they occurred in the volume, those headnotes being placed under proper titles and subtitles in the indices; cross references were then made to other titles and subtitles by short paragraphs referring by numbers to the headnotes thus transferred. This resulted in an index of very little practical value to the bar. One searching for a point of law, in the first place, received very little assistance from having to read in fine print a whole page of the index (such as appears in 209 Mass. on page 733) to make certain he was not overlooking a ruling that would affect his case; nor was it convenient to have to read short paragraphs such as occur on page 735 of 209 Mass. referring to "Contract, 5 and 6" and then turn to "Contract, 5 and 6" on pages 642 and 643 and read two long paragraphs in further search. The bar was rapidly getting to a point where the indices of the Massachusetts Reports were not being used at all. By reason of this fact, the assistant to the reporter of decisions at that time made a careful study of indices to reports not only of this Commonwealth but also of all other States of the Union and of English speaking countries. This resulted in the style which was adopted beginning with 210 Mass. and which has been developed ever since and is still being developed.

The headnotes when made in the volume are carefully classified. The index contains no more long statements, but, instead, short paragraph statements setting forth only enough to notify the searcher whether or not there is in the volume a point of law on the question for which he is seeking and where it can be found. There are no cross references, but these short paragraphs are repeated *in toto* under every title and subtitle where the ingenuity of the index maker can conceive that the point of law involved might be looked for. This, it will be seen, makes a very usable index of accurate references with sufficient detail to prevent the searcher from wasting time in looking up cases by dragnet methods.

This present style of index has another value which has not yet been realized by the bar. Large law offices, libraries, judicial lobbies, and publishers of law books can take the paragraphs as they appear in the present index, paste each one upon a separate card, give it the heading or subheading under which it stands in the index, and transfer it to a card catalog. If this is done as each

volume appears, an automatic, up-to-date index of decisions is attained. The value and convenience of such an index containing all in itself, when compared to that of separate volumes, supplementary and otherwise, of a current index, is readily understood.

Advance Sheets. There are no more parts of the Massachusetts Reports published monthly or otherwise. The Advance Sheets take their place. The present reporter has gratuitously added the burden of reading all opinions before they are sent to the printer for publication in the Advance Sheets, writing catch words therefor together with a short introductory paragraph showing how the case arose in the lower court. This he has found he can do without materially delaying the publication in the Advance Sheets. The printer's contract calls for the publication of the opinion only. He has consented to do the publishing of the catch words and the short introductory paragraph without additional charge. The service at $12 a year is invaluable and its use necessary to any law office desiring to have its law information strictly up-to-date. It is hoped that the printer may be willing to take on the contract for another year. If the bar will show sufficient appreciation thereof, he certainly will, as he is showing a very commendable public spirit in an effort to give to the bench and bar what they need and desire.

THE CONSTITUTIONAL RELATIONS OF THE GOVERNOR AND THE GENERAL COURT UNDER THE FIFTY-SIXTH AMENDMENT.

A question of legislative practice, involving the relations between the Governor and the General Court under the recent 56th amendment to the constitution, was referred to in the press the other day with the suggestion that there might be some uncertainty as to the meaning of the amendment which would require a further constitutional amendment to make it clear. As the relation between the Executive and the Legislature is a matter of serious importance it is discussed here for future reference.

Speaker Young made an eminently sound ruling on the question in the House which appears in the Journal of March 20. The 56th amendment provided that the governor, when a bill or resolve is submitted to him,

> "shall have the right to return it . . . with a recommendation that any amendment or amendments specified by him be made therein. Such bill or resolve shall thereupon be before the general court and subject to amendment and reenactment."

In the matter before the house, the governor had returned a bill with a recommendation for an amendment which was not embodied in any bill originally filed relating to the matter or considered by the House during the progress of the bill, but it was an amendment "within the scope of one of the petitions filed relating to the matter." The Speaker ruled that as the amendment was one which,

> "under the rules of the house is germane to the subject matter of the legislation and . . . within the scope of one of the original petitions upon which the bill was based and hence would have been in order if suggested by the committee or moved as a floor amendment,"

that the bill should

> "be recommitted to the committee of original reference for further consideration and report."

The bill was so recommitted. This ruling was clearly right.

In the course of his opinion, the Speaker explained the problem which might arise in future and suggested the answer as follows:

> "The Chair does not now suggest that the authority of the Governor in recommending amendments is limited to the strict rules of the House, because it is clear that general parlimentary procedure cannot stand as against an expressed grant of executive authority under the Constitution. But if the Executive should recommend an amendment or new bill wholly foreign to the original legislation, a very grave question would be presented. This article cannot have been intended to allow the Executive to escape the constitutional duty of approving or disapproving legislation by recommending, under the guise of amendment, a wholly different measure. The debates of the Constitutional Convention (Vol. III, pp. 931-954) show clearly that the members of that body intended this measure to bring about co-operation between the General Court and the Governor through providing a regular and constitutional procedure which might take the place of informal discussions of the practice of recalling bills from the Governor by vote of the Senate, and of the further practice which has grown up in recent years of executive messages addressed to the General Court or committees thereof and expressing executive opinion upon pending legislation. Nothing in the debates intimates that the Govenor has any right under this article to suggest changes or amendments which are not germane to the original legislation."

That the question might arise in future and that it would be a grave one is obvious. It is fortunate that he has explained the matter so clearly in advance. There seems no doubt that the answer which he has suggested is the sound one, and that no constitutional amendment is necessary to make this clear for the following reasons. The separation of the executive from the legislative department is one of the fundamental constitutional principles of Massachusetts. This does not mean that the governor has no relation whatever to legislation, but that his functions in that connection are specific and in express constitutional grants. Accordingly, he is expressly given the veto power, the power to recommend a budget and supplementary budgets, and to approve or disapprove items or parts of its items in an appropriation bill. He is further given the specific power, which is the subject of this discussion, to recommend amendments in any other bill. Besides this, his power and duty to recommend matters for the consideration of the

legislature in his annual message or by special message has always been recognized as part of his natural function as chief executive. The legislature receives such messages at any time from a co-ordinate department of the government and deals with them by reference to committees and other orderly proceedings in the same manner in which it deals with petitions on other matters.

This recognized power to call matters to the attention of the legislature, however, is quite different from the specific power, granted by the fifty-sixth amendment, to a return a bill, which has passed the legislature with recommendations for its amendment before he acts upon it. The debates in the convention, referred to in the Speaker's opinion above quoted, show clearly that there was no intention to increase the executive power in this direction, but simply to provide a formal recognition of what had been an informal practice for many years, because it was a simple, modern method of doing business calculated to avoid unnecessary delay and misunderstanding. There was a strong movement in the convention, however, to increase very materially the executive power as to legislation. This movement was defeated in the convention for obvious reasons, which appear in the debate. Accordingly, when the history of this amendment is considered, the general principle of the 30th article of the bill of rights, that "In the government of this Commonwealth . . . the Executive shall never exercise the legislative and judicial powers, or either of them," stands in the background and governs the interpretation of the 56th amendment so that it cannot be reasonably interpreted except in its simple and natural sense of authorizing the governor to suggest amendments subject to the same condition which applies to a member of the legislature by the rules of each of its branches.

It is true, as the Speaker suggests, that "General parliamentary procedure cannot stand as against an express grant of authority under the constitution" but, if the natural meaning of that express grant, viewed in the light of its history, places the governnor's recommendations on the same basis as amendments offered by a member on the floor of the House, then the general parliamentary procedure will govern. The answer to the question depends not so much on any authority that might be found, as upon independent reasoning based upon the constitutional principles of Massachusetts embodied in the 30th article of the bill of rights, which, in spite of modern criticisms, still stands as a guidepost throughout the country. While it may be, as the Speaker suggested in an-

other part of his opinion, that a legislative rule should be adopted specifically governing procedure as to such executive amendments in future in order to avoid misunderstanding, yet, in the absence of such rule, the substance of such a rule obviously should be that of the 90th rule of the House and 50th rule of the Senate, which provide that "No motion or proposition on a subject different from that under consideration shall be admitted under color of amendment."

The governor is given power only to "recommend amendments." Thereupon, such bill or resolve shall "be before the General Court and subject to amendment and re-enactment." I submit that the only reasonable interpretation of those words, even without any new rule, is that while the House or Senate must receive any amendment which the governor recommends on the return of a bill, yet, it is not bound to consider such an amendment, if it is not "germane" to the subject, and that a point of order would lie under the existing rule of both branches above quoted to prevent consideration of an amendment which was not "germane" to the subject. Therefore, the suggestion that the constitutional convention left this matter in a state of uncertainty seems to me unsound. No constitutional amendment is necessary.

F. W. G.

THE "NEW ENGLAND COMMON LAW."
JEREMIAH SMITH'S VIEWS IN 1836.

The modern administration of justice practically began in New Hampshire with the appointment of Jeremiah Smith as Chief Justice in 1802, just as it began in Massachusetts with the appointment of Theophilus Parsons as Chief Justice in 1806. In 1816, Smith said, "I am inspired with zeal to examine New England histories, memoirs, records, with a view to her jurisprudence." He called this his "knitting work" and in 1836 he began to prepare some lectures and left many sheets of notes and references; but only a few pages were written out in full. From these notes, the following passage is quoted in Morison's "Life of Judge Smith," 428–9:

> "It is a great error to suppose the New England common law properly so called, from the advances made in all branches of knowledge, is of no importance in New England at this day. For what is the common law of which we

> speak? It is made just as the English common law was made; a collection of the general customs and usages of the community; maxims, principles, rules of action, founded in reason, and found suitable to that first condition of society; if not created by the wisest and most favored, sanctioned and approved by them. Here, every member of society is a legislator; every maxim, which by long usage acquires the force of law, must have been stated, opposed, defended, adopted by rulers and judges, slowly at first timidly, but so acceptable that all approve. If the custom be of a more doubtful class, again debated, criticised, denied, but finally confirmed and established. These principles, after all, may not be wise and salutary maxims; but they have all the wisdom that the people of all classes (every man having precisely the weight and influence he deserves), can give them. Farther advances in knowledge and experience may demonstrate their unfitness and inutility; then they will be modified, and silently changed. The legislature can abrogate this law, as they can the rules of their own making. But it would be well for the people if they would first take the trouble to understand it. No man acquainted with the common law can look into our statute-book, and not see that the framers of the statutes, in many cases, were ignorant that the common law contained precisely the same provision; and in many cases, a provision different and better adapted to the wants of society."

This passage is quoted especially in connection with the discussion of the optional nature of the right of a defendant to a jury trial in a criminal case under the "Massachusetts Common Law" as developed in the 17th century and embodied in the bill of rights, in the August number of this magazine.

F. W. G.

HAS THE SUPERIOR COURT JURISDICTION TO CHANGE JUDGES IN A CRIMINAL CASE BEFORE A JURY IN CASE OF DEATH, ILLNESS OR OTHER INABILITY OF THE ORIGINAL JUDGE TO PROCEED WITH THE TRIAL?

An interesting question of law is suggested by the recent action of the Superior Court declaring a mistrial in a notable case because of the unfortunate accident resulting in the injury to Judge Quinn, the presiding justice, which made it impossible for him to continue with the trial. The injury occurred before the evidence of the government was finished and after the case had proceeded several weeks. According to the accounts in the press, the defendants joined in requesting the court for the assignment of another judge to proceed with the case, expressly waiving any constitutional rights which they might have to such a course. The prosecution moved that a mistrial be declared, as a matter of discretion, first in view of difficulties which a new judge would face under the circumstances of the case, and second, in view of doubts as to the jurisdiction of the court to order the trial to proceed with a new judge. The motion as reported in the press is given in a footnote.*

* "This motion is urged upon two grounds, first, because as a practical matter we believe it is the only possible way in which a full and fair trial can be secured. In this case there are eight defendants, each defended by separate counsel and who are being tried on 28 indictments. There have been 18 days of trial, during which numerous witnesses have been examined and numerous exhibits put in evidence. The energy and ingenuity of the defendants' lawyers have raised an unusually large number of points of law, both as to admission of evidence and as to other matters.

"Numerous rulings have been made by the presiding justice, some final and some subject to further action as the evidence develops. The stenographic record of the case already covers nearly 2000 written pages. No judge, no matter how industrious and able, can possibly take over the case at this point and deal with it in a manner satisfactory to the court, the defendants and the public. Either injustice will be done the defendants or some mistake will be made of which the defendants' counsels will necessarily and properly take advantage, to secure a new trial, in the event that the Commonwealth has obtained a conviction.

"Even apart from Constitutional objections, the only course in the contingency which has so unfortunately arisen is to try the case over again from the beginning.

"Second, it is more than doubtful whether, under the Constitution of Massachusetts, the court has any power to order the trial to proceed with the same jury and a new judge. Article 12 of the Bill of Rights provides that the Legislature shall not make any law that shall subject any person to a capital or infamous punishment without trial by jury. It is established that infamous punishment includes any offense punishable, like those with which the defendants are charged in the case at bar, by imprisonment in State Prison, *Jones* v. *Robbin*, 8 Gray, 329, 349. And as has been said by Chief Justice Rugg, 'The trial by jury preserved by our Constitution is the common law trial by jury in its essential characteristics as known and understood at the time the Constitution was adopted.' *Bothwell* v. *Elevated*, 213 Mass., 467, 473.

"In a recent decision of the United States Circuit Court of Appeals for the second circuit, the court in construing the phrase, 'trial by jury,' has used in the Constitution of the United States where it presumably has the same meaning in the Massachusetts Constitution laid down, 'that in a criminal case, trial by jury means trial by a tribunal consisting of at least one judge and 12 jurors, all of whom must remain identical from the beginning to the end.' It was there decided that this requirement could not be waived by the defendant and a new trial was ordered because one judge had been substituted for another, although with the defendant's expressed consent.

The court declared a mistrial. Several practical questions affecting the future practice of the court are suggested by the grounds stated in the motion of the prosecution.

I. Has a defendant in a criminal case tried before a jury a constitutional right in Massachusetts that the same judge should preside throughout the trial?

II. If he has such a right, can he waive it?

III. If he waives it, has he a right to insist that the trial proceed with another judge, or is it a matter subject to the discretion of the court?

The first two of these questions appear never to have come up for decision in Massachusetts before the Supreme Judicial Court.

In the Federal Courts, however, the question arose in 1915 in case of *Freeman* v. *U. S.* 227 Fed. 732. That was a charge of conspiracy for using the mails for the purpose of fraud, etc., in which the trial lasted about four months, during the course of which a new judge was substituted for some reason. It does not appear from the opinion whether the defendant expressly consented to this change or merely proceeded with the trial without objection. The defendant was convicted and brought the case before the Circuit Court of Appeals for the Second Circuit, consisting of Circuit Judges Lacomb, Ward and Rogers. In a unanimous opinion by Judge Rogers after an extended review of authorities, it was decided that

> "In a criminal case [in the Federal Courts] trial by jury means trial by a tribunal consisting of at least one judge and twelve jurors, all of whom must remain identical from the beginning to the end. It is not possible for either the government or the accused or both to consent to a substitution either of one judge for another judge or of one juror for another juror. The continuous presences of the same judge and jury is equally essential throughout the whole of the trial."

A new trial was ordered. At the beginning of the opinion on this point, it is stated that, "So far as we are informed, the question has never before been raised in a Federal court whether one judge can be substituted for another in a criminal trial either with

"In view of this decision and similar decisions elsewhere, see especially *Durden* v. *People*, 192, Illinois, 493; *People* v. *Shaw*, 63 New York, 36, we think it probable that if the case went on under another judge than Mr. Justice Quinn and a conviction was secured that there would be very grave danger that it would be set aside by the Supreme Judicial Court, a danger sufficiently great to make it highly expedient that the attempt to continue with another judge should be made.

"We therefore ask for a mistrial and that the case be begun again before a new jury and a new judge."

or without the consent of the accused." As the question appears never to have been passed upon by the Supreme Court of the United States, this decision is controlling in the Federal Courts for the Second Circuit and, under the principle of comity between circuits would, in all probability, be followed by the Circuit Courts of Appeal in the other Federal circuits (See an article on, "Comity in the Federal Courts," by Arthur March Brown, Esq., of the Boston Bar in the *Harvard Law Review* for April, 1915).

As the provisions in the Federal Constitution relating to this matter have to do only with proceedings in the Federal courts, the opinion, while entitled to the weight which justly attaches to the views of the distinguished judges who composed the court in the Second Circuit, is not a controlling precedent in the state courts. Furthermore, the language in the Massachusetts Constitution, and presumably in some of the other states, relating to jury trial differs in its phraseology from that in the Federal Constitution. The question, therefore, is still open in Massachusetts. As already suggested, even in the Federal courts it is still open before the Supreme Court of the United States if the question under the Federal Constitution should be carried there or should be certified to that court by the Circuit Court of Appeals in any of the other circuits. Before proceeding with the discussion of the question in Massachusetts, the language of the Federal Constitution thus interpreted in the Freeman case should be noticed. Judge Rogers, after referring to Magna Charta, continues as follows:

"That instrument declared that no freeman should be deprived of life or liberty 'but by the judgment of his peers or by the law of the land,' and this has been expounded as referring to a trial of all persons by a jury of twelve men, although strictly speaking it is more likely that it referred to the trial of the barons by their peers. The Constitution of the United States as originally adopted provides in the third article as follows:

'The trial of all crimes, except in cases of impeachment, shall be by jury.'

The First Congress, however, in September, 1789, proposed to the Legislatures of the several states ten amendments, which were promptly ratified. The fifth amendment provides that:

'No person shall be . . . deprived of life, liberty, or property, without due process of law.'

The sixth amendment provides that:

'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.'

'In suits at common law, where the values in controversy shall exceed twenty dollars, the right by jury shall be preserved.' ''

He then calls attention to the opinion of the Supreme Court of the United States in *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13, 19 Sup. Ct. 580, 585, 43 L. Ed. 873 (1889) where the court said:

'' 'Trial by jury,' in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted and so seldom contested, that there has been little occasion for its distinct assertion.' ''

Judge Rogers then says:

''As the Constitution specifically declares that 'the trial of all crimes . . . *shall be by jury,* it is difficult to see how it can be maintained that the trial of a crime in a federal court need not be by jury, provided the accused person consents to be tried in some other manner. The question of how he shall be tried does not seem open to his determination, but appears to have been settled for him by the mandatory provision of the Constitution of the United States, however it might be under the Constitution of a state differently worded. It is necessary, too, to have in mind that the trial of one charged with crime affects not merely the rights of the accused, but the public interests. As Blackstone expressed it—4 Commentaries, p. 189—'the king has an interest in the preservation of all his subjects.' The Declaration of Independence declares that all men are endowed by their creator with certain *inalienable* rights; that among these are life, *liberty*, and the pursuit of happiness. In his great work on Constitutional Limitations, p. 576, Judge Cooley, discussing waiver of rights, said that:

'Consent in a criminal case can not bind the defendant, since criminal charges are not the subject of arbitration, and any infliction of a criminal punishment upon an individual, except in pursuance of the law of the land, is a wrong done to the state, whether the individual assented or not.' ''

Further quotation would unduly extend the present discussion, the purpose of which is merely to present the question from different angles with suggestions as to the answer rather than to

present an extended review of the authorities similar to that contained in the opinion in the Freeman case.

Turning now to the Massachusetts Constitution, the language in regard to jury trials in criminal cases has been recently quoted and discussed in the August number for 1923 of this magazine in connection with the question whether the right of jury trial in such cases is optional or obligatory, and whether a defendant has a *right* to a trial before a court instead of before a jury in the Superior Court if he so desires. The opinion was there expressed after extended examination of the historical development that the right guaranteed by the twelfth article of the bill of rights was one as to which the defendant had always had an option under the common law of Massachusetts and that this option still survived and was not turned into a requirement in the guise of a right, by the constitution of 1780.

In the opinion of Chief Justice Shaw in *Com.* v. *Daly* 12 Cush. 82, he stated that the defendant "may waive any matter of form or substance excepting only what may relate to the jurisdiction of the court," and that, "The court are of the opinion that on the trial of a conspiracy,

"supposing it an irregularity to take the verdict of eleven jurors without the consent of both parties, yet as it did not affect the jurisdiction of the court, the exception was one that the accused might waive; that having stipulated of record that he would take no exception to such irregularity, he is now precluded from taking it, and therefore that the verdict must stand"

In the preceding paragraph, he said:

"But it is asked, if consent will authorize a trial before eleven jurors, why not before ten, or six, or one. It appears to us, that it is a good answer to say, that no departure from established forms of trial in criminal cases can take place without permission of the judge, and no discreet judge would permit any such extravagant or wide departure from these salutary forms as the question supposes, nor any departure, unless upon some unforeseen or urgent exigency." See also *Com.* v. *Merrill,* Thatcher's Crim. Cases 1.

The discretion of the court in the interests of justice in regard to such unforeseen circumstances was thus expressly recognized unanimously by our court in 1853 when it consisted of: Shaw, C. J., Charles A. Dewey, Theron Metcalf, George T. Bigelow, Benjamin F. Thomas and Pliny Merrick. Of course, in referring to such discretion, the court assumed that it would be exercised under the

solemn sense of responsibility, later described by Chief Justice Shaw in *Com.* v. *Anthes* 5 Gray 185, p. 232:

"The case seems to have been argued as if the only object of the Constitution, in securing a jury trial, is to rescue a party accused from the grasp of the public prosecutor, and that all the propensities of the judge are in favor of the prosecutor. But the Constitution countenances no such theory; on the contrary, it is solicitous to make the judge impartial and independent, so that he may throw the broad shield of the law over an innocent man who is entitled to its protection, whilst it gives a true direction to the weapon of the law to punish those who have been guilty of its violation." (See also *Com.* v. *Merrill,* Thatcher's Criminal Cases I).

It is further clear in Massachusetts that a defendant not in custody may, by his absence waive his constitutional right to meet the witness face to face." (See *Com.* v. *McCarty,* 163 Mass 458).

With the first ground stated by the prosecution for the exercise of the discretion of the court in dismissing the jury and ordering a new trial because of the illness of the judge, this article is not concerned. The questions here discussed arise on the second part of the motion of the prosecution, in which a doubt is suggested as to the jurisdiction of the court to continue the trial with another judge if the court, in its discretion upon consideration of all circumstances, should decide that it was in the interest of justice, both for the defendants and for the public, so to continue with the consent or, as in this case, upon the request of the defendants. The uncertainty arising from the fact that it had never been decided in Massachusetts and had been decided adversely in the Federal Court was properly argued and doubtless considered in connection with the exercise of discretion. It is here discussed without record to the case referred to.

The question differs from the question recently discussed in the August number of this magazine as to whether the right to jury trial in Massachusetts is optional or a requirement, as to which the defendant has no option. The present question is whether a defendant who insists upon his right to a jury trial must, as a matter of constitutional law, be tried by the same judge and a full jury even if he prefers to take his chances with a new judge and the court in its discretion decides that such a proceeding would be just both to the defendant and to the public.

In considering this question as a general one without regard to the particular case referred to and the question of discretion therein

decided, it is important to consider the practical nature of the constitutional rights of the defendant, rather than rhetorical phrases as to the institution of jury trial. Let us assume, then, a case in which a defendant is indicted and brought to trial before a jury and that all of the most important witnesses whom he wishes to call in his defence are aged and infirm so that there is a strong probability that if the trial is not continued, but is postponed, one or more of them will die. Whereupon, the defendant would be deprived of what might be the most convincing evidence in his defence. Of course such a situation is not at all improbable. In order to test the question of jurisdiction, let us assume that the principal witness for the defence was known to be a dying man, although he was able to be brought into court to testify at the time. Let us assume that the presiding justice suddenly dies or becomes incapacitated as the defendant is about to call this witness. The defendant is then faced with the dilemma that if the trial does not continue his main "hope" of defending himself against a strong body of evidence presented by the government will disappear because of inability to call this witness as a living witness. On the other hand, there is the problem whether he wishes to trust himself to the jury under the direction of another judge for the remainder of the trial. The defendant decides that he would rather go on and that he is ready to trust the fairness of the new judge rather than to risk the practical injustice which would result from his being deprived of his most important evidence by the probable death of his witness during a postponement. He states his position to the court and asks the court to assign another judge to proceed with the trial. The court in its discretion decides that the interests of justice require such a course as is requested by the defendant.

Is it possible that the Constitution of Massachusetts means that the court can not continue the trial under such circumstances and absolutely requires the trial to stop, deprives the defendant of his opportunity to present his principal witness, and subjects him to a second trial without that witness although the full jury, which is to decide the facts, would hear all the evidence and would be ready to hear the rest of it? That such a case might not often arise is no answer. The way to test questions of jurisdiction as distinguished from questions of discretion is to assume the possibility of such a case (c.f. 12 Cush. 81), which is no more improbable than the possibility of sudden illness or death of the presiding judge which gives rise to the problem. While differences in regard to the meaning of

constitutional rights under the state and under the federal constitutions may, perhaps, be unfortunate, the argument based on the desire for "uniformity" seems an extremely weak one when applied to such a case, particularly in view of the differing language between the state and federal constitutions. Since the Supreme Court of the United States has not yet passed upon the question, the situation in such a case may well suggest a respectful doubt as to the soundness of the general proposition laid down by Judge Rogers in the passage quoted from the Freeman case in the Federal courts, *as far as the question of jurisdiction on the express consent of the defendant,* as distinguished from mere passive acts, is concerned. As applied to such a case, the quotation from Blackstone that "The king is interested in the preservation of his subjects" and the references to the Declaration of Independence and to Judge Cooley seem to have the characteristics of rhetoric, rather than of reasoning, on the human problem of the relation of the defendant to his constitutional rights.

With the practical result that a new trial was granted in the Freeman case, this discussion is not concerned. The only question here discussed is the bare question of law as to the jurisdiction of the trial court. In view of the increasing problems of judicial administration with which the American courts are faced today and the resulting practical problems which may arise for defendants in considering whether to rely upon or to waive certain details of their constitutional rights, the subject seems a distinctly practical one for professional consideration as a matter of constitutional, as distinguished from rhetorical, reasoning. The decision of the Superior Court in the Massachusetts case does not involve any ruling on the question of jurisdiction here discussed.

F. W. G.

TO WHAT EXTENT, IF AT ALL, IS THE RIGHT TO JURY TRIAL OPTIONAL IN CRIMINAL CASES IN THE FEDERAL COURTS?

Since the discussion of the nature of the right to jury trial under the Massachusetts Constitution in the August number of this magazine for 1923, the practical nature of the problem has been demonstrated in a manner which furnishes an answer to those who have believed that the question was academic as no defendant would want to waive a jury trial. Judge Bishop, of the Superior Court, tried the experiment a few weeks ago in a case appealed from the District Court in which a colored man was the defendant. At the suggestion of the judge, the defendant's counsel inquired of his client whether he wished to waive a jury trial. The writer is informed by counsel for the defendant that his client gladly took advantage of the opportunity to be tried before the court without a jury as he was more afraid of the possible prejudices among twelve jurymen than he was of the judgment of the court. Accordingly, the trial proceeded without a jury in about half the time it would have taken with a jury, and the court found the defendant guilty.

The article referred to has resulted in a number of inquiries as to whether there is any option in the matter in the Federal courts. Without undertaking an extended review of the authorities, the following suggestions are submitted in order to bring the question before the bar for discussion by those interested. Just as the question has never been decided by the Supreme Judicial Court of Massachusetts, so it never appears to have been decided by the Supreme Court of the United States. No direct decision has been called to the writer's attention on the point in the lower Federal courts. General statements, however, have appeared in certain opinions of the Circuit Court of Appeals to the effect that a jury trial in criminal cases can not be waived except in the so-called "minor" offences as distinguished from what are called "high misdemeanors". Among these statements are those quoted from the opinion by Judge Rogers of the Circuit Court of Appeals of the Second Circuit in the case of *Freeman* v. *U. S.* already quoted on the jurisdiction of the court to proceed with a jury trial under another judge when the original judge has been unable to proceed because of illness or for some other reason. Other statements appear in the divided opinion of the Circuit Court of Appeals for the First

Circuit in the case of *Dickinson* v. *U. S.*, 159 Fed. 801. This was an indictment of a bank cashier for unlawfully "converting" the funds of his bank. During the trial, one of the jurors, "by reason of illness was unable to sit further". Whereupon, a written agreement was signed by the defendants and by the United States Attorney consenting that the juror might be discharged and the trial proceeded before the remaining eleven jurors "with the same force and effect as if said juror had not been discharged". Subsequently, before the trial was finished, death occurred in the family of another juror and another like agreement was filed all around as to that juror. The trial proceeded with ten jurors who returned a verdict of guilty. Thereafter, the defendant moved in arrest of judgment on the ground that the same could not be lawfully rendered upon the verdict.

The question came before the Circuit Court of Appeals, consisting of: Putnam, Circuit Judge, and Aldrich and Brown, District Judges. The majority of the court, consisting of Judges Putnam and Brown, decided that the defendant's waiver was of no effect and the judgment of the district court and the verdict therein were set aside. Judge Aldrich dissented.

In the majority opinion by Judge Putnam, he says:

"There is no question that it was settled law in England that, in case of felony, the jury panel could not be weakened by waiver of the person prosecuted. *Thompson* v. *Utah,* 170 U. S. 343, 353, 354, 18 Sup. Ct. 620, 42 L. Ed. 1061; *Queenan* v. *Oklahoma,* 190 U. S. 548, 551, 23 Sup. Ct. 762, 47 L. Ed. 1175. But with regard to misdemeanors, we have made a very diligent search, and find no pronounced practice prior to the Constitution in the English courts or elsewhere with reference to like waivers. It is no doubt true that, within the states of Maine, Massachusetts, and New Hampshire, there has been to a certain extent practical recognition of the power in cases of misdemeanors to waive a full jury as the same was waived here; but apparently this was never formally approved until *Commonwealth* v. *Daly,* 12 Cush. (Mass.) 80, decided in 1853. This practice, whatever it was, is not of such antiquity or universality as to effect the construction of the Constitution of the United States. In the absence of any historical guide, other state courts have arrayed themselves on different sides of the topic in numerous decisions, and under somewhat different constitutional forms of expression, and to some extent without recognizing any distinction between felonies and such high crimes as are misdemeanors. This has gone so far that it will be of no avail for us to do more than cite two or three of the leading authorities, and explain our conclusions as briefly as we can. This is especially so in view of the fact that

it is beyond our power to enter a judgment which involves finality, and it is also of little consequence what judicial results are reached until we have a determination of the Supreme Court directly on the issue, which determination we have never yet received."

The court discussed the opinion of Chief Justice Shaw in *Commonwealth* v. *Daly,* 12 Cush. 80, in which it was held that a defendant might waive the right to a full jury trial with the permission of the court, and declined to follow it.

Judge Putnam further said:

"We have referred impliedly to the fact that the rule of the Supreme Court is that, ordinarily, the federal courts in any district may follow the settled practice in criminal cases in the state which includes the district in existence at the time the Constitution was adopted. While this rule may not go so far as to control directly the construction of the Constitution, nevertheless, it can not be questioned that if, as shown historically, there had been, at the common law, or even in Massachusetts before the Constitution, a practice of excusing jurors in misdemeanors, this would have weight under *Robertson* v. *Baldwin,* 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 175, *Capital Traction Company* v. *Hof.,* 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873, and *Williamson* v. *United States,* 207 U.S. 425, 28 Sup. Ct. 162, 52 L. Ed., already cited, as such ancient practices have with regard to waiving the disqualification of jurors, and even their impartiality, at least in trials for misdemeanors. For the traditional law of New England we look to Dane's Abridgment, where we are unable to find any trace of a practice supporting the proceedings now in review before us; and Chief Justice Shaw, who certainly would have known of such a practice if there had been any, in no degree rested *Commonwealth* v. *Dailey* on any assumption of that nature."

Judge Aldrich, in his dissent, agreed that

"the right of an accused in a case like this to have 12 jurors throughout is so far absolute as a constitutional right that he may have it by claiming it, or even by withholding consent to proceed without that number, and doubtless, under a constitutional government like ours, the interests of the community so far enter into any incidental departure from that number, in the course of the trial, as to require the discretionary approval of the court, and that the proper representative of the government should join the accused in consent.

but he said:

"In the lot of humanity men fall sick and die, and if the constitutional safeguard is so hard and fast that an accused, who has been subjected to a constitutional trial for three months, cannot

waive a fractional part of the right which he has enjoyed in order to save his substantial right and get a result, but must be subjected to the burden of another trial with perhaps the same dilemma, it will become an instrument of oppression rather than one of protection, and thus the preventive would become something worse than the apprehended danger."

He further called attention to the fact that the Supreme Court of the United States relied upon the opinion of Chief Justice Shaw in the Dailey case in *Schick* v. *U. S.*, 195 U. S. 65, in sustaining the right to waive a jury trial altogether in a criminal information to impose a penalty under the oleomargarine act. Judge Aldrich continued:

"It is probable that the history and debates of the constitutional convention will not be found to sustain the idea that the constitutional safeguards in question were in any sense established as something necessary to protect the state or the community from the supposed danger that accused parties would waive away the interest which the government has in their liberties, and go to jail.

"There is not now, and never was, any practical danger of that. Such a theory, at least in its application to modern American conditions, is based more upon useless fiction than upon reason. And when the idea of giving countenance to the right of waiver, as something necessary to a reasonable protection of the rights and liberties of accused, and as something intended to be practical and useful in the administration of the rights of parties, has been characterized as involving innovation 'highly dangerous', it would, as said by Judge Seevers in *State* v. *Kaufman*, 51 Iowa, 578, 581, 2 N. W., 275, 277, 33 Am. Rep. 148, have been much more convincing and satisfactory if we had been informed why it would be 'highly dangerous'.

"So far as practical consequences to the liberties of accused parties are concerned, a hard and fast rule of law which denies the right of an accused to waive the loss of a juror, stricken from the panel by sickness or death, during the progress of the trial, would be far more dangerous and intolerable than would a rule which accords to an accused, upon written application, joined by the government, and under the approval of the court, the right to waive the fractional loss whereby he may establish his right to liberty and save to himself the expense, the delay and the oppressive imprisonment incident to another trial.

"Traced to its English origin, it would probably be found, so far as the right of waiver was there withheld from accused parties, that in a very large sense the reason for it was that conviction of crime, under the old English system, operated to outlaw and to attaint the blood and to work a forfeiture of official titles of inheritance, thus affecting the rights of third parties.

"In every substantial sense our constitutional provisions in respect to jury trials in criminal cases are for the protection of the interests of the accused, and as such they may, in a limited and guarded measure, be waived by the party sought to be benefited."

The prosecution carried the decision to the Supreme Court of the United States, but that court decided that the question was not properly before it and, therefore, declined to consider it (See *U. S.* v. *Dickinson,* 213 U. S. 92) accordingly. It is settled law, at present, in the first circuit, at least, that a defendant charged with a so-called "high misdemeanor" can not waive his right to a full jury if he is to be tried at all by a jury.

On the question whether his right to a jury trial under the Federal Constitution is an absolute requirement or a special right, there appears to be no Federal decision in point. The question of jurisdiction involved seems quite different from the same question under the Massachusetts Constitution, because the judiciary article of the Federal Constitution provides that in Federal Courts "The trial of all crimes . . . shall be by jury." As pointed out by Judge Brewer in *Schick* v. *U. S.*, in the original draft, the words "criminal offences" were used, but this was subsequently changed in the final document to the word "crimes" probably because of the distinction drawn by Blackstone between the word "crimes" as denoting "such offences as are of a deeper and more atrocious dye, while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors' only." The court in the Schick case then decided that waiver of jury trial in that case for the recovery of a penalty and the *consent* to trial by the court was not in conflict with the law. The fact that the provision in regard to the trial of "crimes" appears in the body of the judiciary article rather than in the first ten amendments which contain the Federal Bill of Rights, the sixth article of which provides that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," suggests a question of jurisdiction which does not seem to appear under the Constitution of Massachusetts where the provision for jury trial appears solely in the Bill of Rights as an individual right of the citizen and not of the government. The judiciary article deals primarily with the jurisdiction of the Federal Courts, although, in describing such jurisdiction, it also confers certain rights upon persons involved in litigation who are thereby given the right to invoke jurisdiction thus described. The

mandatory appearance of the words, "The trial of all crimes, except in cases of impeachment, shall be by jury," makes a very much stronger case against the jurisdiction to try without a jury than any language in the Massachusetts Constitution. On the other hand, the judiciary article does not entirely confine itself to jurisdiction. There are some sentences in it which obviously have the character of provisions in a bill of rights. An example of this is found in section 3, which provides that,

"No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court," and further the provision that "No attainder of treason shall work corruption of blood or forfeiture except during the life of the person attained."

These provisions obviously are protections of the rights of individuals rather than as to the jurisdiction of courts. It seems arguable that the words as to the trial of "crimes" are of a similar character and that as such they do not go to the jurisdiction of the court, but guarantee a right to the individual in the same sense as the provision in the sixth amendment already quoted. If this is so, the question whether the right of jury trial thus guarded is a right which the defendant may "waive" seems to be open even before the Supreme Court of the United States free from the question of jurisdiction because under the present judicial clause quoted, as well as under the old judiciary act, the Federal Courts have always had jurisdiction "of all crimes and offences cognizable under the authority of the United States." This means the jurisdiction to try defendants in accordance with their constitutional rights, whatever they may be. If those rights include a right to choose between a trial by court and a trial by jury, the jurisdiction of the court must be co-extensive with that right.

It seems possible that the traditional review of the profession in regard to the nature of constitutional rights of this character have been affected somewhat by the constant use of the word "waiver," which is apt unconsciously to lead us to picture some unfortunate defendant as yielding to organized society, represented by the government, in some detail of an attempt to oppress him, but it is submitted that this picture is fallacious in this connection. The real problem is whether the individual charged with an offence is to be tried as an intelligent free man and allowed if fully informed to exercise a free man's choice between a trial before a judge, in whose fairness he may have confidence, or a jury, as to whose intelligence, prejudices or impartiality he may, in a particu-

lar case, have very serious practical doubts. Does the Constitution of the United States provide a real right in this matter, or does it force a requirement down the throat of the individual? The long experience in Maryland showing the extent to which defendants prefer to trust the courts, rather than juries, is too clear to be brushed aside with rhetoric. It has been suggested that, if any question was raised in regard to the nature of the right in Maryland, there would be an outburst of support of the option as one of the "inalienable rights of man." F. W. G.

Note.

In the passage quoted from Judge Aldrich's dissenting opinion, he says:

"Traced to its English origin, it would probably be found, so far as the right of waiver was there withheld from accused parties, that in a very large sense the reason for it was that conviction of crime, under the old English system, operated to outlaw and to attaint the blood and to work a forfeiture of official titles of inheritance, thus affecting the rights of third parties."

In the article in the August number, it was pointed out that jury trial in criminal cases came in originally in place of the older modes of trial "because of the consent of the accused." In order to obtain that consent or, in case a defendant stood mute and refused to plead, to force him to plead, the extraordinary and barbarous process of *peine forte et dure* was resorted to. This resulted either in the forced consent or in the death of the defendant. The only intelligible explanation of such a condition of affairs is that suggested by Judge Aldrich and explained by Thayer in his account of "Trial by Jury and Its Development" in his "Preliminary Treatise on Evidence," p. 77:

"As is well known, there was a reason for enduring this horrid torture, in the doctrine that one who was not formally adjudged guilty did not forfeit his lands. In 1565, Sir Thomas Smith (Com. Eng. book 2, c. 26) writes: 'His condemnation (for standing mute) is to be pressed to death, which is one of the cruelest deaths that may be. He is laid upon a table, and another upon him, and so much weight of stones or lead laid upon that table, while his body be crushed and his life by that violence taken from him. This death some strong and stout-hearted man doth chose; for, not being condemned of felony his blood is not corrupted, his lands nor goods confiscate to the Prince,' etc. Mr. Pike's account (Hist. Crime, ii. 194-5; ib. 283-5) of Strangeways' sufferings in 1658, of Burnsworth's, in 1726, under nearly four hundred-weight, and of John Durant's case, in 1734, are horrible, but interesting."

PRIZES FOR ESSAYS TO TEACH THE FEDERAL CONSTITUTION TO CHILDREN.

The Editor received the following announcement which appeared in the papers on Washington's Birthday:

NEW YORK, Feb. —Prizes totalling $7,500 for articles interpretive of certain principal provisions of the Constitution of the United States were announced today by Lloyd Taylor, Chairman of the Committee on Constitutional Instruction of the National Security League.

The object of the announcement is to attempt to obtain a simplified exposition of the Constitution suitable for implanting an understanding of the American form of government in the minds of children between the ages of 10 and 15. The National Security League, which has been promoting Constitutional education throughout all the States for the past two years, has found that there are many excellent works on the Constitution adapted to the adult mind but practically nothing that appeals to children. If satisfactory material is obtained, it will be published in book form by the National Security League for nation-wide circulation at a nominal charge.

The prizes will be divided, ten each of $750, for acceptable interpretations of the following provisions of the Constitution. Each clause is born of history and experience and offers a wide field for literary inspiration.

Preamble—"We, the people"
The Framework of the Government
Habeas Corpus
Grand Jury and Trial by Jury
Freedom of Speech, assembly and religion
Right of private property
Protection against search and seizure and quartering of troops
Declaration of wars
Supreme Court
Method of Amendment

The Conditions

The conditions are simple,—

The articles must be not more than 750 words in length (making the offer at the rate of $1 a word).

All articles must be submitted by mail to Lloyd Taylor, Chairman, Committee on Constitutional Instruction, National Security League, 17 East 49th Street, New York City, on or before June 1st. The awards will be announced on or about the Fourth of July.

It is to be understood that all articles submitted become the

property of the National Security League, with full publication, radio and motion picture rights, and that the Committee reserves the right not to make award on any or all of the items if no article submitted is adjudged to be suitable for the purpose intended.

The Committee hopes that the announcement will awaken the interest and active co-operation of the best writers in the country, as it has come to the opinion that the most effective method of reaching the child mind in this matter will be through historical interpretation in semi-fictional form.

Mr. Taylor Explains

In discussing the plan, Mr. Taylor said today,—

"Those who instruct children in history and government realize the difficulty of interesting the average child in these subjects, particularly the Constitution. Yet we find that, if the story-telling method is used to illustrate the subjects, much better results are gained.

"It is the object of our Committee to secure model stories describing the essential clauses of the Constitution as remedies for the evils of misgovernment.

"The writing of such stories by master hands will be a work of Americanism and patriotism which will extend for the rest of time in the educational system of this country and help to perpetuate the Constitution in its integrity. We are looking for a 'Robinson Crusoe', 'Alice in Wonderland', or 'Treasure Island.'

"The reward we offer is not great, but we cannot pay for the patriotic inspiration which must bring about the results we desire.

Not a Text-Book

"We believe that teaching the Constitution to children is not a difficult matter and has been neglected largely through lack of proper material for the inspiration of the teachers. I wish to emphasize that we are not planning a text-book but something which the children can read and fully understand with slight explanation by their teachers or parents.

"The Constitution embodies all the romance and appeal to the imagination that form the basis of America and her history, and it should be possible to properly ground the minds of our boys and girls in true Americanism through teaching them these inspirational things.

"The Constitution of the United States is not a dead, dull document. It is the very substance of our freedom. Eloquently taught and interpreted in story form by a teacher who knows and reverences its provisions, it will rouse any class to enthusiasm. The Constitution is not a thing of the past, but is more alive and more needed than ever. It is a human document which is directly connected with the life of every individual, young and old, in the

United States, perhaps the world, for its purpose is to properly safeguard the rights of the individual, that all may have an equal chance.

"Behind this great document are all the romance, history and poetry of the great American Republic. Men have struggled and died for its provisions; great battles have been fought to preserve its principles; and the success or failure of representative government in the world depends upon maintenance of our Constitution in all its integrity."

TRIFLING WITH THE AMERICAN SPIRIT—SHALL INCOME TAX RETURNS BE OPENED TO PUBLIC INSPECTION?

(Reprinted for Springfield Union of Feb. 25, 1924.)

The process of breaking down the proper secrecy that hitherto has surrounded the income tax returns of individuals and corporations has begun. The House of Representatives by a vote of 158 to 100 has added an amendment to the tax bill—now made the football of politics—which empowers the Ways and Means Committee, the Senate Finance Committee and any special committee of either body to inspect all such returns. If the Senate gives its approval, this departure will be the entering wedge to a system of espoinage that will destroy what little privacy still remains to the American citizen with respect to his personal affairs. From limited publicity as to income declarations of the individuals it is but a step to the unlimited publicity urged by Rep. Frear of Wisconsin and other Republican insurgents.

No one need laugh out of court the amendment humorously and sarcastically offered by Rep. Edmonds (Rep.) of Pennsylvania, which would permit any three neighbors of the taxpayer "when they thought he did not pay enough taxes" to examine his sworn figures and "comment upon them to the collector and the neighborhood." If Congress sanctions this publicity idea in embryonic form there is no telling when we shall see the full fruition—when every man's private business and domestic concerns shall be the theme of street corner speculation and gossip. No form of taxation is popular, but least popular of all is the income tax with its inquisitorial features, burdensome restrictions and petty annoyances. Yet with knowledge of this fact here is Congress doing something to make it a further object of hostility and derision.

The vast majority of persons who are compelled by law to file

a statement of their taxable income make their declarations honestly and conscientiously. They take oaths that to the best of their knowledge and belief they have correctly disclosed their true financial condition. The Government maintains a large force of inspectors to check up these returns where any possible doubt exists as to their accuracy. There is first the normal impulse of the individual to be truthful, and second, the penalties that attach to any intentional untruthfulness on his part. Yet because a very few persons may have no compunctions against defrauding the Government, Congress seriously proposes to give its committees the privilege of satisfying their malice or curiosity by pawing over the tax returns of every person and every corporation, and making such use of the information as they may see fit. If Congress can get away with this breach of trust it will be encouraged to go further, until it requires no stretch of the imagination to see one's income, whether it be small or large, discussed as freely as the weather.

Rep. Hawes (Dem.) of Missouri, speaking on this vicious amendment, rightly said: "It violates every consideration of Anglo-Saxon fair play; it destroys the old theory of the right of castle. It cannot be done without striking a fatal blow to our theory of governments." The un-American character of this proposal will impress most liberty-loving citizens in exactly the same way. It well illustrates the tendency so frequently exhibited of late to Prussianize our Government and surround the individual with all sorts of tyrannies, both large and small. There should be vigorous resistance to such flagrant acts of usurpation.

CANONS OF JUDICIAL ETHICS OF THE SPECIAL JUSTICES' ASSOCIATION OF MASSACHUSETTS.

(From the Boston Transcript of Dec. 27, 1923.)

At a recent meeting of the Special Justices Association of Massachusetts, an organization of special justices of district, municipal and juvenile courts of the State, a code of ethics was adopted by the judges present, the first time in this Commonwealth that judges have adopted such a code for their own guidance.

The canons follow:

> The obligations of duty and conduct which bind all Justices presiding in the courts of the Commonwealth, apply with equal force to all Special Justices.

A Special Justice, therefore, should always serve the public interest. He should be temperate, attentive, patient, impartial, diligent in ascertaining the facts, and careful to apply the principles of the law thereto. He should be firm, but not arbitrary or controversial, in the execution of his duty. He should be considerate of counsel, of witnesses, of litigants and of all others in attendance upon the courts. He should be prompt himself and insist upon promptness in others, realizing that their time, as well as that of the court, is valuable.

He may properly intervene in a trial held before him to promote expedition and prevent unnecessary waste of time or to clear-up some obscurity, bearing in mind, however, that undue interference, impatience or a severe attitude toward counsel, witnesses or litigants may tend to prevent the proper presentation of the cause or the ascertainment of the truth in respect thereto.

He should not permit private interviews, arguments or communications calculated to influence his judicial action, except in cases where provision is made by law for ex parte application.

A Special Justice should insist upon diligence in the despatch of business before the court by refusing to grant continuances of cases except for good cause shown.

A Special Justice should co-operate with other justices to promote satisfactory administration of justice. In imposing sentence he should endeavor to conform to a reasonable standard of punishment and should not seek popularity or publicity either by exceptional severity or undue leniency.

A Special Justice, by reason of his small compensation and infrequent and uncertain service, is not expected to refrain from the practice of his profession, but his position is one of great delicacy and he should be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success.

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and should administer justice according to law.

The officers of the association are: President, Robert W. Hill of Salem; vice president, Charles J. Brown of Boston; secretary, Josiah S. Deane of Boston; treasurer, Edward B. Pratt of Plymouth.

THE "FEDERAL AID GIANT."

The following discussion appeared in the *Springfield Union* of January 29th, 1924. It is reprinted with a supplementary note on the constitutional question with references to Madison's views, in order to provoke discussion both as to policy and legality.

THE "FEDERAL-AID" GIANT.

PRESIDENT'S RECENT UTTERANCES DESERVE THOUGHTFUL ATTENTION.

To the Editor of The Union.

Sir: The President's recent talk to the Federal executive officers has received less attention that it deserves, and particularly the following sentences which relate to the class of "Federal Aid" measures. In the address as reported, President Coolidge said:

> "I take this occasion to state that I have given much thought to the question of Federal subsidies to State governments. The Federal appropriations for such subsidies cover a wide field. They afford ample precedent for unlimited expansion. I say to you, however, that the financial program of the Chief Executive does not contemplate expansion of these subsidies. My policy in this matter is not predicated alone on the drain which these subsidies make on the national treasury. This of itself is sufficient cause for concern. But I am fearful that this broadening of the field of government activities is detrimental both to the Federal Government and the State governments.
>
> "Efficiency of Federal operations is impaired as their scope is unduly enlarged. Efficiency of the State governments is impaired as they relinquish and turn over to the Federal Government responsibilities which are properly theirs."

It is obvious that there can be no tax reduction if Congress embarks on a program of state aid for maternity purposes under the Sheppard-Towner act, for education under the proposed Sterling-Reed Bill, and for similar compacts on a 50-50 basis with separate States in regard to all kinds of other things which are, constitutionally, none of its business, because they are within the principle of local self-government protected by the 10th Amendment.

The President refers to the fact that there is "ample" precedent for "unlimited expansion" in this direction. This does not necessarily mean constitutional precedent in a legal sense. Many

of the earlier grants of land, etc., for the benefit of education in building up States in the West were appropriations by Congress of the "public lands" or of the proceeds under the express provision in Art. IV., section 3, that "The Congress shall have power to dispose of the territory or other property of the United States." But the distribution of the money raised by taxation is a very different matter, as the power of taxation was given to Congress not for unlimited purposes, but to carry out the powers specifically enumerated or necessarily incident to the national government. "Federal aid" measures, like the Sheppard-Towner maternity act and the proposed Sterling-Reed Education Bill (providing for separate compacts with each State under which Congress will contribute a certain proportion of $100,000,000 and more to such States as comply with certain conditions specified in the acts of Congress or regulations thereunder), represent a new class for the indirect exercise of power by Congress over the local affairs of the States of so unlimited a character as to raise a new question of constitutional law. It seems beyond the scope of any principle hitherto clearly recognized.

There is a misunderstanding of the recent opinion of the Supreme Court of the United States. Charl Ormand Williams in an article in the February number of Good Housekeeping, entitled "Putting You in Education," makes the statement (on page 166):

> "The Constitutionality of this procedure has been established for all time by the decision of the Supreme Court last spring in regard to the Sheppard-Towner maternity act."

The court did nothing of the kind. In the opinion they said, "We have reached the conclusion that the cases must be disposed of for want of jurisdiction without considering the merits of the constitutional questions." They said nothing whatever that can be twisted into a decision in support of the constitutionality of these acts. They simply decided that the question had not been brought before them under such circumstances that they were warranted in deciding it.

It is not an uncommon idea that nothing is unconstitutional unless the Supreme Court says so, but this shows a misunderstanding of the function of the court. The court does not act as a revision committee for Congress. There may be many questions of constitutional law which are difficult and even impossible to bring before the court by a proper proceeding in such a way that it is their duty to decide them. The Supreme Court's only function is to decide litigated cases in which the question may arise whether an act of Congress relied on by one party violates the Constitution which is relied upon by the other party as "the supreme law of the land." When that situation arises, it is their duty to decide. That is all there is to it.

But it is the duty of every member of Congress to consider the question in regard to every act that is passed whether it is within the power of Congress under the Constitution. It is important that the voters should also consider this question whether it ever comes before the court or not.

One of the arguments presented orally by Mr. Rawls of Baltimore to the court in opposition to the maternity act deserves more general attention than it has received. He said, "Where is there any power for compacts for extension of power in the Federal Constitution? Let us ask ourselves that question."

The people of the United States adopted a constitution giving Congress certain specified powers and expressly and emphatically reserving to the States all the powers not therein conferred upon Congress; thereby protecting the principle of local self-government as part of the foundation of national strength. Article V. carefully provided methods by which that constitution can be amended. But, without any amendment, Congress undertakes to rely on the words "general welfare" as a basis for authority to make separate contracts with each of the 48 States on a 50-50 basis, to distribute national tax money to such of the States as comply, and continue to comply, with conditions specified in the act of Congress. These appropriations and conditions relate to subjects clearly within the recognized principle of local self-government. By imposing such conditions, Congress necessarily legislates indirectly upon those subjects for some States and not for others, and uses the national taxes as a bait with which to seduce the state governments or their temporary representatives to surrender control or lose the contribution of the Federal Government. That is the human nature of it.

Thus, Congress attempts to do, by separate contract, indirectly, something which the 10th amendment expressly prohibits, and for which there is no power given to spend or to raise the national taxes. If the words "general welfare" used in the Constitution warrant this action, then Congress can extend its power indefinitely, without any amendment of the Constitution or authorization from the people, whenever it can persuade any State (or the temporary representatives of the government of any State) to enter into such agreements with the assistance of a body of busy bureaucrats acting as go-betweens.

The fact that the conditions in the contracts provided for in the Sterling-Reed Bill sound harmless and simple does not alter the situation at all. If Congress can impose any condition whatever, make these contracts with the States, and distribute the money, then it can or, at least, will probably try to change the conditions later as well as increase the amounts appropriated.

In the early '80's, William G. Sumner said: "The type and formula of most schemes of philanthropy and humanitarianism is this: A and B put their heads together to decide what C shall be made to do for D. I call C the Forgotten Man." The idea thus

expressed was one of the reasons why Congress was not given unlimited powers by the Constitution.

This "Federal-aid" policy, which President Coolidge has warned against with his customary "adequate brevity," will (if it is not stopped) by the natural working of human nature, and, in spite of all the theoretical language used in the statutes, grow into a giant political automaton, with a tremendous power of suction in regard to the control of local affairs in the States and the consequent weakening of the sense of individual responsibility, which is the basis of the idea of local self-government and part of the strength of the Nation.

We separated from England in the 18th century partly to protect the idea of local self-government in this country because we did not like being governed from a distance in our local affairs. As a matter of common sense, do we want to create and feed this "Federal-aid" giant?

Boston. F. W. GRINNELL.

NOTE ON MADISON'S VIEWS.

DO THE WORDS "GENERAL WELFARE" AS USED IN THE CONSTITUTION CONSTITUTE A "HEEL OF ACHILLES" FOR THE WHOLE INSTRUMENT?

Perhaps the fullest recent historical discussion, in support of the constitutionality, but not the policy, of such acts as the maternity aid act and the proposed education act, is the article on "The Spending Power of Congress" in the "Harvard Law Review" for March, 1923, by Edward S. Corwin. James Madison had as much to do with the drafting of the Constitution as any one, and, in the 41st number of the "Federalist", he explained that the words "general welfare" were taken from the Articles of Confederation and were not intended to contain an unlimited grant of power to override all the other provisions creating a balanced dual system of government. This explanation must have been an important factor in securing the ratification of the Constitution, for otherwise all the carefully balanced provisions, re-enforced as they were expected to be, and subsequently were, by the tenth amendment, were mere suggestions, rather than barriers to a complete destruction of the character of the government created, by congressional encroachment through the taxing and spending power, and the resulting establishment of a centralized government. *If Madison's views on this point then expressed had not reflected the common understanding it seems a safe guess that the constitution would not have been ratified.* He repeated these views, near the end of his life, in 1830. Mr. Corwin disputes them and points out a variety

of congressional spending habits as precedents for a practical interpretation of "general welfare" limited only by congressional discretion. The trouble with this argument is that it runs up against the principle of the child labor cases, which seems to be that Congress cannot indefinitely suck up *prohibited* powers *indirectly* by the use of *granted* powers. Any one who has listened to public arguments of enthusiastic supporters of the proposed bill for Federal aid to education knows that some of them, at least, are interested quite as much in *enforcing conditions* as they are in *aiding* education in the states. The argument that the power to tax is the power to destroy is not always convincing against the existence of the power to tax in specific case. But the question which seems to be approaching for the American people, and possibly for the court (if any one succeeds in raising it in a proceeding in which the court must decide it) is, whether the interdependent spending and taxing powers of Congress exist in such unlimited form that through their progressive joint or alternate exercise the essential character of the government established by the Constitution can be destroyed and a new form of government established by Congress in its unlimited discretion and without constitutional amendment. The current attempts in Congress at indirect exercise of prohibited powers, and "direct" taxation, in competition with the states, by means of ingenious statutory language, having the appearance of *indirect* taxation, seem to involve this question in one way or another.

Trevelyan, in his history of "England Under the Stuarts" (p. 122) speaks of Lord Coke as having "turned the minds of the young gentlemen at the Inns of Court . . . to contemplate a new idea of the constitutional function and of the political affinities of their profession which they were destined in their generation to develop in a hundred ways as counsel for England gone to law with her king."

While Mr. Corwin and others may regard James Madison as a lonely figure in this discussion, it may yet be that, through the 41st number of the "Federalist" and his later note on the enlargement of Congressional power through Congressional spending and compacts with temporary state governments, Madison will help to call the present generation of the bar "back to the Constitution" and inspire them "in a hundred ways as counsel" for the people of the United States "gone to law" with their Congress over the following question.

> "Does the Constitution mean that Congress can tax us all in any way it pleases in order to spend the money for any purpose and in any way it pleases upon any conditions it pleases and with the assistance and support, and, at the instigation, of as many office holders, state and federal, as it pleases, provided Congress in its absolute discretion considers it to be for the 'general welfare'?"

The American bench and bar may well read and reflect on the last part of the 41st number of the "Federalist" and Madison's note in 1830. (See Writings of Madison Vol. IX, pp. 424-431.)

THE PROPOSED "IRRITATION" TAX ON GIVERS.

The Finance Committee of the Senate has thrown out this tax which was inserted in the pending revenue bill by the House; but comment on the House plan may be timely in case of an attempt to reinsert it.

The Outline of Progress in Taxation Under a Theory of Government by Epithet.

1. Impose an estate tax.

2. Create a "fiction" by charging a man with "evasion" if he honestly prefers to give away his property before he dies, instead of having the government give it away or squander it after his death.

3. In order to prevent this "evasion", impose by definition of the "estate", a tax on completed gifts "made in contemplation of death", which are not and cannot be made part of the "estate" except for the purpose of taxation. Take a chance that this attempt to create a non-existent part of the "estate", by using legal looking words will "get by" the court.

4. In order to prevent "evasion" of this tax, impose a tax on all givers measured by the amount of gifts, including Christmas and birthday presents, made during any year regardless of any "contemplation of death" motive. Take a chance on the legality of this.

5. In order to prevent "evasion" of this tax, define a "gift" so as to include the difference between the value actually received and the "fair market value" of all property "sold or exchanged" during the year.

6. Result. Government supervision and inspection of every transfer of property in the United States.

A few weeks ago it was reported that almost $124,000,000 of

taxes, "illegally, erroneously collected", had to be paid back by the Federal government. It is still undecided whether a great many more millions of taxes collected will have to be paid back. Congress passed an "estate" tax law, the general features of which have been sustained as constitutional by the Supreme Court of the United States. The basis of the court's decisions seems to be that the complete transmission of property by the fact of death, *as an accomplished fact*, is something of such a nature, under the laws of the jurisdiction where it occurs, that it is a subject for *indirect* taxation by Congress in the form of an excise or "death duty." The *fact of death* is said to be the "generating source" of the taxing power.

As the result of various state statutes, of a tax-grabbing character, and various somewhat vaguely-reasoned judicial opinions, treasury rulings, and recommendations, Congress undertook by taxation to extend the application of the "estate" tax to include completed transfers *inter vivos*, if they were found, or "presumed" to be made, "in contemplation of death" in the opinion of government inspectors or as the result of litigation. This kind of taxation is said to be justified in order to prevent "evasion" of the estate tax. The theory of "evasion", of course, is based on the idea that an American citizen is under some moral obligation to the government not to reduce his property by gift (although he may lose or squander it) so that the government may tax his estate after he is dead. Probably few Americans who have any property are or ever will be conscious of any such moral obligation. However, the tax is there in the law and it has not yet been decided by the Supreme Court of the United States whether it is constitutional. If they decide that it is not, probably many millions will have to be paid back by the government.

In spite of this uncertainty, the House recently inserted in the pending tax bill a new tax on givers which is at least frank in its expressed intention to tax givers during their lifetime regardless of any "contemplation of death". As this proposed form of "irritation" tax would obviously create a new legal mess for lawyers to fight over while the business of the country suffers, some consideration of it in advance seems worthwhile in order to provoke discussion. From the Congressional Record of Feb. 29, it appears that a tax is proposed "upon the transfer of property by gift, whether made directly or indirectly, by every person whether a resident or non-resident of the United States." The tax is to be a tax on the giver based on "the sum of all the gifts made during the calendar year" and "where property is sold or exchanged in money

or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall . . . be deemed a gift." An information return is to be made each year of all such gifts or transfers with certain arbitrary exemptions as to amounts.

Accordingly, it was frankly proposed to tax a man, not for getting property, not on the privilege of transmission of property by the fact of death, but to tax him while he is alive for getting rid of his property while he is alive. It would be a tax, not on accumulation, but on reduction. One is led to ask, "Why not tax losses?"

It seems sufficient to point out that if the words of the attempt to include in the definition of a "gift" the excess market value of the price actually paid were to be taken seriously, it would mean inspection and interference with all kinds of business transactions and would be palpably absurd. But, confining ourselves to the proposal to tax mere givers as distinguished from makers of bargains, if any tax can be more direct than a tax on a man because he gives away property, I should like to know what it is. There seems to be no privilege involved in making a complete gift while a person is alive. If anything is a natural incident of the conception of private property as protected by our laws, it seems to be the right to give away the property if an individual wants to. The motive for so doing is nobody's business as long as it is an honest motive.

In the two child labor cases, the Supreme Court decided that Congress could not use its power to regulate interstate commerce or its taxing power as an indirect method through which to suck up the powers of the states, when the constitution expressly provides for a Congress which will mind its own business. Applying the same idea to the suggestion of taxing givers for exercising rights which are natural incidents of their right of property, Congress cannot circumvent the express prohibition against laying "direct taxes" without apportionment by merely attempting to create an artificial, separable privilege by the use of the legal-looking words "the transfer of property by gift". The use of those words does not specify, and can not create, anything taxable by Congress. Incidentally, such a tax involves, of course, taxing generosity and exempting all "tight-wads". It seems as arbitrary and illegal as the old law school example of a poll tax on red-haired men. In other words, it is putting a poll tax on givers with certain exemptions—a direct tax based upon arbitrary discrimination.

The natural and plausible common argument in support of every kind of extension or abuse of Congressional power when it comes before the court is, of course, that Congress has already gone so far in this general direction by doing this, that, or the other, that the court cannot logically or reasonably draw a line at the latest step without "usurping" power. This sort of argument is a good deal like saying that, because a young man has been squandering his income, but has had the self-restraint not to waste his principal, the fact that he has been wasting his income is a reason why he should throw away the rest of his character by wasting his principal, also, and thus destroy his reserve force so that he will have nothing left with which to "brace up."

The principles of the Constitution of the United States resemble the self-imposed restraints which go to make up strength of character in an individual. There is nothing new about this idea. It is as old as Plato.

Chief Justice White meant something when he said in *Knowlton* v. *Moore*, 178 U. S. at 109:

> "If a case should ever arise where an arbitrary and confiscatory excise is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so."

Mr. Justice Day meant something when he said in *So. Ry.* v. *Green*, 216 U. S. 400, "Arbitrary Selection", . . . cannot be justified by calling it "classification".

James Otis meant something when, in his "Vindication of the Massachusetts Representatives", in 1763, he stated, in one sentence, what became the underlying principle of American constitutional law as follows:

> "Although most governments are *de facto* arbitrary, and consequently the curse and scandal of human nature; yet, none are *de jure* arbitrary."

That sentence expresses the difference between American constitutional government and English constitutional government, and thus disposes of arguments based upon any English, or other European, practice which may be cited. American constitutions were established for the purpose of establishing the distinction drawn by Otis and preventing the customary arbitrariness of government as far as practicable.

Otis put the whole matter in a nutshell, but, as Lord MacNaughton once said, "It is one thing to put something in a nutshell and another thing to keep it there."

Cases seem to be rapidly approaching in which the court will be face to face with the question whether the "*de jure*" character of an American constitution is to be protected, or whether the government is to continue to degenerate through the interpretation of the spending and taxing powers into the arbitrary "*de facto*" character which, as Otis said, is "the curse" of most governments. But, in considering the proposed tax on givers, we do not have to rely upon the yet-to-be-defined principles for protection against forms of arbitrary confiscation, which have not yet been enclosed in the field of permissible taxation by the fence of legal-looking words. The directions as to the power of Congress to lay "direct" taxes are explicit. And as already pointed out the child-labor cases establish the principle that Congress may not use its express powers as a disguise for indirectly sucking up other powers.

An exceptionally well written article on "Retroactive Excise Taxation" by Julius H. Amberg has just appeared in the Harvard Law Review for April. The opinion of the Circuit of Appeals in *Shwab* v. *Doyle*, 269 Fed. 321, is mildly commented on (p. 693). Mr. Amberg might have gone further and pointed out that as soon as Congress leaves the firm ground of the *accomplished fact of death* as the *operating* fact in the transfer and therefore the "generating source" of the taxing power, it inevitably steps into a quicksand of arbitrary selection, or "*de facto*, as distinguished from *de jure*, classification, and resulting *direct* taxation. He suggested that "if during the existence of an enactment, any person does that which subjects him to a tax, he cannot ordinarily complain. He goes into the transaction with open eyes". But after an examination of the authorities he concludes that "it may be contended without any Supreme Court authority to the contrary, that an unapportioned retroactive *excise* is void in that it is in effect not an excise at all, but a direct tax upon property." He points out that income taxes are not excise taxes but direct taxes which, because of the Sixteenth Amendment, need not be apportioned. His analysis of the real nature of a retroactive excise tax suggest the similarity between an invasion of the field of direct taxation by a retroactive clause and the attempt to do the same thing by a definition, or phrase specifying, what the Massachusetts court has called "an immaterial fact" as basis of the excise. When one stops to think about it, the phrase "in contemplation of death", when used as a basis

of taxation, is a palpable example of arbitrary phraseology, unless its meaning is confined, as Chief Justice White, in *Knowlton* v. *Moore,* evidently assumed (see 178 U. S. at p. 65), to transfers which are not *completed* except by the fact of death. The taxable thing under this phrase (emphasized by the statutory presumption and the rates) is *not the transfer,* but the "contemplation"—the state of mind. That is necessarily a "direct" tax on the giver collectible out of his estate after he dies. Now the basis of the power of indirect taxation is *the transfer by the fact of death* not the state of mind of the deceased and this attempt to give an *anticipatory* effect to the death by the use of words really changes the character of the tax, perhaps even more clearly than a retroactive clause. So with the clause of the suggested tax on *givers* measured by their annual "transfer of property by gift", when the language is analyzed the tax would not only be "direct" on the giver but, even if it were not so expressed it would still be so for the words transfer "by gift", do not specify any "material fact" which separates the act of giving from the "general ownership" of property (Cf "Property Rights Under the Constitution" by George Walter Smith in the "New Federalist Series", Am. Bar Ass'n Journal, April, 1924, 242).

As far as the progressive idea of taxation to avoid "evasion" of other taxation is concerned, it is well for the tax-gathering minds in Congress and elsewhere to remember that the fate of King Lear is likely to remain for a long time to come an effective warning to those who think of giving away all their property during their lives and living solely on the bounty of their adoring relatives.

While some people may very naturally and very honestly and properly give away some of their property while they are alive because, as already suggested, they prefer to give away their own property, instead of having it taken and squandered by one or more governments, yet, there is no public advantage or reason in trying to invent either a *moral* "fiction" that there is anything wrong in their point of view or a new kind of *legal* "fiction" through the use of language to meet the assumed abuse that has no existence except as the result of the first *moral* "fiction", which is in itself false and unnatural. Secretary Mellon has pointed out that, what may be called *dramatic* taxation, for political effect, does not produce revenue because it "kills the goose that lays the golden eggs". But it does produce a very large crop of *irritation* which does nobody any good.

F. W. G.

AN EXPERIMENT WORTH CONSIDERING IN THE ADMINISTRATION OF THE CRIMINAL LAW.

At the recent annual meeting of the Association of Justices of the District Courts of Massachusetts, the following suggestion was submitted. It is repeated here for the consideration of the bar generally.

When an experiment, as to the advisability of which there is serious controversy, is suggested, the optional, as distinguished from the mandatory, method of trying it may be wise. An extended discussion was printed in the August number tracing the history of the right to jury trial in criminal cases in Massachusetts and pointing out the optional nature of the right of the defendant. The answer to all the sceptics who do not believe that defendants in criminal cases would exercise an option not to have a jury trial is answered, not only by the fact that over 70% of the criminal cases in the City of Baltimore are tried without a jury at the request of the defendant, but further that in most of the criminal cases in the Massachusetts courts the right to jury trial is waived by the failure to claim an appeal. This fact is the real reason for the existence of our district court system. Otherwise, there would be no use in having any district courts at all if every case had to be tried over a second time upstairs.

Accordingly, criminal procedure, based upon the consent or option of the defendant in some form or other, is already a part of our system and has been ever since we had district courts. It is common knowledge, however, that the usual reason for claiming appeals in criminal cases is not a genuine desire for a jury trial to settle the facts, but is to set aside the trial below and avoid any further trial whatever by congesting the criminal docket in the Superior Court and thus forcing the hand of the prosecuting officer into some form of disposition without trial because of the fact that trial may not be practicable in view of the congestion of the docket.

It is obvious that the act of 1922, allowing the Chief Justice of the Superior Court to call in temporarily district court judges to try certain classes of criminal cases with juries has greatly reduced the congestion, not only by the number of cases actually tried, but still more because the defendants, when they found they could be tried, have pleaded guilty and taken their sentences. Still

greater numbers have not appealed their cases so that the number of appealed cases in counties like Suffolk has been very materially reduced.

The Judicature Commission, on pp. 96 and 147 of its report, recommended as an experiment in the Municipal Court of the City of Boston, the plan of calling upon a defendant in a criminal case to choose before trial whether or not he wanted a jury trial; that if he wanted a jury trial, his case should be transferred forthwith to the Superior Court but, if he did not, then he would waive his jury trial and be tried in the Municipal Court with no right of appeal on the facts but with the right to take questions of law to the Apellate Division and, if necessary, to the Supreme Court. Further, he had the right to apply for summary revision of the sentence to a "Reviewing Board" of three judges of the Municipal Court. This recommendation of the commission was favorably reported by a majority of the Judiciary Committee in the legislature in 1923, but, instead of limiting it to the Boston Municipal Court, which was in a position to try the experiment favorably because of its ten years' experience with the Civil Appeals Act, the plan reported was made to apply to all the district courts in the state. It excited vehement opposition, not only from members of the bar, but from many district court judges all over the state. As a result of this opposition, it was emphatically defeated in the Senate. A copy of the bill thus reported and defeated in the Senate, Senate 361 of 1923, was bound up at the end of the May number of this magazine for 1923 and its story was told in that number, pages 12-15. That bill provided that a defendant *must* exercise his option in the district court before trial. It was the objection to this *mandatory* option, rather than to the idea of a "Reviewing Board" for sentence which led to the defeat of the bill.

It was suggested to the Association of Justices at the meeting above referred to that the experiment of an optional petition for summary revision of sentences alone by a "Reviewing Board", as an *alternative* to the existing right of appeal on the whole case for a jury trial, would be worth trying as an experiment in the Municipal Court of the City of Boston, without touching the right of appeal, in any way, except that the petition for such *review* of sentence should be a waiver of *appeal* so that a man could not try both. The advantage of such a plan would be that a genuine judicial tribunal of three judges, at least two of whom were not present at the trial

and had no part in the sentence, would be offered to a defendant who wished to have his sentence considered by such a tribunal.

Such an optional experiment would not affect the right of appeal in the slightest degree so that all the oratory devoted to that subject would be beside the point. The argument that nobody would ever exercise such an option is completely and obviously answered by the fact that we cannot tell until we try; that if they do not use it no harm is done but, if they do use it, there will be just so much waste of power avoided and we shall have made a practical test in the administration of justice which is worth making.

Therefore, I suggest that the substance of s. 26-F in Senate 361 of 1923 (which will be found at the end of the May number of the MASSACHUSETTS LAW QUARTERLY for 1923) as an optional experiment in the Municipal Court of the City of Boston be considered by the newly created Judicial Council when it comes into existence under the act printed elsewhere in this number.

F. W. G.

EXTRACT RELATING TO EDUCATIONAL PROFESSIONAL STANDARDS OF MASSACHUSETTS FROM THE REPORT OF THE COMMISSION APPOINTED UNDER CHAPTER 33 OF THE RESOLVES OF 1922.

Chapter 33 of the Resolves of 1922 provided for the appointment of a commission of seven, "to inquire into and report upon the opportunities and provisions for technical and higher education within the Commonwealth" and the needs and possible methods of supplementing them including the question of the establishment of a State University, etc. Mrs. George Minot Baker, one of the commissioners, died before the report was filed. The other members of the commission were as follows:—Hector L. Belisle of Fall River; Rev. William Devlin, S. J., of Newton, Jeremiah F. Driscoll of Boston; Dr. Lemuel H. Murlin of Boston; Carlton D. Richardson of West Brookfield; Felix Vorenberg of Boston.

A carefully considered report has just been filed in which the commission is unanimous that a State University is not advisable. A number of recommendations are made of a constructive character, as to all of which the commission appears to be unanimous except one in regard to the establishment of junior colleges, as to which Rev. Father Devlin has filed a brief dissenting report.

The following extract from the unanimous discussion in the

body of the report seems of professional interest to the legal profession.

The Situation in Regard to Medical Education.

Massachusetts ranks very high among all the States in the Union in facilities for medical education, all of which is provided through private endowment. Unfortunately her standards of admission to the practice of medicine fixed by the State, place her among the half-dozen lowest in this respect. This low standard encourages the establishment of schools of inferior grade which could only exist in a very few States in the Union. Graduates of low grade medical schools may register as physicians in Massachusetts, though denied that privilege in all but three other States of the Union. The condition invites inferior graduates of inferior medical schools to locate in Massachusetts, while other States encourage superior graduates of superior medical schools to come to them where the standards for admissions to practice are higher.

The development of medical education during the last quarter of a century has been remarkable, and there are indications that this development has only begun. This progress has been accompanied by a tremendous increase in cost of medical education, which has become the despair of university and college executives. The survey shows that the total annual university expense for medical education may easily reach $1,000 per student; this, of course, does not include the student's personal expense. Notwithstanding this high cost, one of the primary obligations of society, is a generous support of medical education. Health and physical strength are essential to material and spiritual prosperity; before culture and the refinements of civilization can be enjoyed, society must be protected from weakness and disease. Massachusetts cannot afford longer to evade a larger share of the responsibility for medical education, costly though it be. This requisite to the efficiency and happiness of our people is self-evident.

Legal Education and Practice.

The situation in regard to the practice of law in Massachusetts is even more unfortunate, if possible, than that of the practice of medicine. It is equally fortunate with medicine in that private endowment gives the Commonwealth unsurpassed opportunities for the highest type of legal training. It is unfortunate, as in medicine, in that the standards which the State establishes for admission to practice are exceedingly low, since a candidate for admission to the bar

in Massachusetts may not be required to take an examination as to his general education provided he is "a graduate of a college" or "has complied with the entrance requirements of a college, or has fulfilled for two years the requirements of a day or evening high school, or of a school of equal grade." This is pronounced a "masterpiece of vagueness and is possible of almost any convenient interpretation." This State policy encourages inferior students from inferior schools to locate in Massachusetts and encourages superior graduates of superior schools to locate elsewhere.

CHAPTER 244 OF THE ACTS OF 1924.

AN ACT PROVIDING FOR THE ESTABLISHMENT OF A JUDICIAL COUNCIL TO MAKE A CONTINUOUS STUDY OF THE ORGANIZATION, PROCEDURE AND PRACTICE OF THE COURTS.

Be it enacted, etc.:

"Chapter two hundred and twenty-one of the General Laws is hereby amended by inserting after section thirty-four, under the heading "Judicial Council", the following three new sections:—

Section 34A. There shall be a judicial council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; one judge of a probate court in the commonwealth and one justice of a district court in the commonwealth and not more than four members of the bar, all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods, not exceeding four years, as he shall determine.

"*Section 34B.* The judicial council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various

courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

"*Section 34C.* No member of said council shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve."

Approved April 12, 1924.

Note.

This act takes effect 90 days from April 12th. It is substantially the plan recommended by the Judicature Commission in its report in 1921 (see MASSACHUSETTS LAW QUARTERLY, January, 1921) which was brought before the legislature again this year in the report of the Attorney General.

A SUGGESTIVE ILLUSTRATION OF THE PRACTICAL LIMITS OF "LAW ENFORCEMENT."

(Reprinted from the Boston Post of February, 1924.)

PRAGUE, Feb. 5.—The constitution of Czechoslovakia makes it compulsory to vote and provides for punishment for neglecting to obey in the form of a substantial fine or imprisonment, or both. The attitude of the citizens, however, is making the voting section a dead letter. They refuse to avail themselves of suffrage in such numbers that the courts are overwhelmed.

At the recent municipal election in Prague, out of 450,000 voters, 50,000 stayed away from the polls. Enforcing the constitution will mean the courts can do nothing else and brings out the fact that there are not jails enough. Hence that section of the constitution is not being enforced.

THE PROPOSAL THAT THE LEGISLATURE SHOULD RESUBMIT TO THE VOTERS THE "REARRANGEMENT" OF THE CONSTITUTION PREPARED BY THE LAST CONSTITUTIONAL CONVENTION AS A "REVISED" INSTRUMENT OF GOVERNMENT AND THE OPINION OF THE ATTORNEY-GENERAL THAT SUCH SUBMISSION WAS NOT WITHIN THE CONSTITUTIONAL POWER OF THE GENERAL COURT.

The story of the controversy over this document in the convention, in the legislature, and before the courts, and the reasons for its appearance in print at the beginning of the General Laws (under a caption, referring to the decision of the Supreme Judicial Court in *Loring* v. *Young* and thus explaining that it is not the constitution) has been told at intervals in these pages [See Vol. IV, p. 116, Feb. 1919; Vol. IV, p. 309, Aug. 1919; Vol. V, No. 2, Feb. 1920 (H. 993 and S. 243) Discussions on pages 18-20 and 86-91; Vol. VII, No. 3, Feb. 1922, pages 168-183]. Further details as to the litigation may be found in the record and the five briefs in the case of *Loring* v. *Young*, 239 Mass. 349, sets of which may be found in the Social Law Library, the State Library, and various other libraries; also in Bridgman's History of the Convention.

A petition was filed with the legislature this year asking the legislature to submit the "Rearrangement" to the voters as a "legislative *amendment*" which, if ratified by the people, should thereupon become a new "revised" instrument of government. This proposal (Senate 54) was referred to the legislative Committee on Constitutional Laws. That committee requested the opinion of the Attorney-General as to the constitutional power of the General Court in the matter. Attorney-General Benton rendered an opinion that it was beyond the legislative power. On April 7th "Mr. Shuebruk, for the committee on Constitutional Law . . . reported, in accordance with a provision of Joint Rule No. 23, recommending that the amendment proposed by said petition (see Senate, No. 54), ought NOT to pass (Senator Youngman, and Representative Farrell of Fall River, dissenting). The report was read and placed on file, in accordance with the requirements of Joint Rule No. 23." (*Senate Journal*, Apr. 7, 1924.) Reprints of the opinion were obtained

from the state printer and are bound up in the following pages. In order that the Attorney-General's opinion may be better understood, the introductory part of Senate 54 is here printed as an introduction to the opinion.

SENATE . . . . . No. 54.

"Resolve to provide that the Rearrangement of the Constitution adopted by the Voters in November, Nineteen Hundred and Nineteen amended to conform to Existing Law, shall be the Constitution of the Commonwealth.

Resolved, By the Senate and House of Representatives, in joint session, that it is expedient to alter the constitution by the adoption of the following articles of amendment, to the end that they may become a part of the Constitution if similarly agreed to in a session of the Next General Court and approved by the people at the state election next following:

ARTICLES OF AMENDMENT.

The Constitution or Form of Government of the Commonwealth of Massachusetts, adopted in seventeen hundred and eighty, and the sixty-seven articles of amendment thereto, is hereby deemed and taken to be revised, altered and amended by the Rearrangement of the Constitution adopted by the voters at the state election in November, nineteen hundred and nineteen, which is hereby declared to be the Constitution of the Commonwealth of Massachusetts, with Article 31 amended by striking out the word "male" in the first line. With Article 44 amended by striking out the word "May" and inserting in its place the word:—April,—in the first paragraph thereof and inserting the words:—at such time as may be fixed by the legislature,—after the words "every tenth year thereafter" in said paragraph, so that as amended the first part of it will read as follows:—A census of the inhabitants of each city and town, on the first day of April, shall be taken and returned into the office of the secretary of the commonwealth, on or before the last day of June in the year one thousand nine hundred and thirty-five, and in every tenth year thereafter at such time as may be fixed by the legislature,—and with Article 94 amended by striking out in that part entitled "Emergency Measures" the words "A separate vote shall be taken on the preamble by call of the yeas and nays, which shall be recorded, and unless the preamble is adopted by two-thirds of the members of each house voting thereon, the law shall not be an emergency law; but" and substituting the following:—A separate vote, which shall be recorded, shall be taken on the preamble, and unless the preamble is adopted by two-thirds of the members of each house voting thereon, the law shall not be an emergency law. Upon the

request of two members of the Senate or five members of the House of Representatives, the vote on the preamble in such branch shall be taken by call of the yeas and nays. But,—with Article 123 amended by striking out the words "change of name shall render the commission void but shall not prevent reappointment under the new name," and inserting in the place thereof the following words:—Upon the change of name of any woman, she shall re-register under her new name and shall pay such fee therefor as shall be established by the General Court,—with Article 157 amended by striking out the whole of said article as now written therein and substituting the following:—Article 157. "Upon the ratification and adoption by the people of this revision of the Constitution, the Constitution heretofore existing with all the amendments thereto, shall be taken to be so revised, altered and amended. All laws, rights, remedies, duties, obligations and penalties which exist and are in force when the Constitution as so amended is ratified and adopted, shall continue to exist and be in force as heretofore until otherwise adjudged or provided". The Constitution or Form of Government for the Commonwealth of Massachusetts will then be as follows:

A CONSTITUTION

OR

FORM OF GOVERNMENT

FOR

The Commonwealth of Massachusetts.

(Then followed the text of the "Rearrangement" printed in the General Laws *but changed as above specified.*)

SENATE . . . . No. 386

Opinion of the Attorney-General, rendered to the committee on Constitutional Law, at its request, as to the constitutionality of presenting to the people the question of adopting as the Constitution of the Commonwealth the revision of the Constitution made and adopted by the Constitutional Convention in 1919 and ratified by the people in that year.

The Commonwealth of Massachusetts.

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, March 4, 1924.

Joint Committee on Constitutional Law, State House.

GENTLEMEN: — You have submitted to me Senate Resolve No. 54 of 1924, and have asked my opinion upon the following questions of law in relation thereto: —

"Is it constitutionally competent for the General Court to act upon the 'Resolve to provide that the Rearrangement of the Constitution adopted by the voters in November, nineteen hundred and nineteen, amended to conform to existing law, shall be the Constitution of the Commonwealth' (Senate No. 54), under the provisions of article XLVIII of the amendments to the Constitution or under any other provision of the Constitution?

2. Would the adoption of a revised or rearranged constitution be an amendment of the Constitution of the Commonwealth, within the meaning of article XLVIII of the amendments to said Constitution?

3. May a revised or rearranged constitution be constitutionally adopted in any other manner than through the instrumentality of a constitutional convention?"

It is the official duty of the Attorney General to advise a committee of the Legislature only with respect to such bills as may be actually pending before it. III Op. Atty. Gen. 111; Atty. Gen. Rep., 1921, p. 140. *Cf.* G. L., c. 12, § 9. The justices of the Supreme Judicial Court in rendering opinions under Mass. Const., pt. II, c. III, art. II, follow a similar rule. *Opinions of the Justices*, 122 Mass. 600; 226 Mass. 607, 612. Your first question relates

directly to a measure pending before you and hence requires full consideration. Your second and third questions are general in form, but you state that they are asked in connection with the pending resolve. For that reason, I shall treat them as incidental to the main inquiry in your first question.

Furthermore, I assume that your questions refer solely to the authority of the General Court under the existing Constitution and to the operation and effect of that instrument. In response to an inquiry concerning possible methods of amending the Constitution, the justices of the Supreme Judicial Court, in an opinion rendered in 1833 (*Opinion of the Justices*, 6 Cush. 573, 574), said: —

> "The court do not understand, that it was the intention of the house of representatives, to request their opinion upon the natural right of the people in cases of great emergency, or upon the obvious failure of their existing constitution to accomplish the objects for which it was designed, to provide for the amendment or alteration of their fundamental laws; nor what would be the effect of any change and alteration of their constitution, made under such circumstances and sanctioned by the assent of the people. Such a view of the subject would involve the general question of natural rights, and the inherent and fundamental principles upon which civil society is founded, rather than any question upon the nature, construction, or operation of the existing constitution of the commonwealth, and the laws made under it. We presume, therefore, that the opinion requested applies to the existing constitution and laws of the commonwealth, and the rights and powers derived from and under them."

Accordingly I discard from consideration all question of the validity of legislative action under altered constitutional conditions, or of the possible efficacy of unauthorized legislative action by virtue of hypothetical future happenings.

I also assume from the form of your questions and the caption of the resolve, which purports to provide that the Rearrangement "shall be the Constitution of the Commonwealth", that the very essence of the proposed measure is the substitution of a new for an existing constitution, and that the term "revised or rearranged constitution", as you use it, means such a substituted constitution.

What are the provisions in the existing Constitution for its amendment, revision or rearrangement?

In the Constitution originally adopted there are two references to possible changes. The first is in article VII of the Bill of Rights, providing that —

"Therefore the people alone have an incontestible, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it."

The second is in chapter VI, article X, of the Frame of Government which provides that —

"In order the more effectually to adhere to the principles of the constitution, and to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary," —

the General Court in 1795 shall take steps for the calling of a constitutional convention to consider revising or amending the Constitution.

No convention was called in 1795, as directed by that provision, but in 1820 a convention was held which submitted to the people a number of amendments, of which nine were adopted, becoming the first nine articles of amendment to the Constitution. The ninth amendment provided for amendments to the Constitution, in the following terms: —

"If, at any time hereafter, any specific and particular amendment or amendments to the constitution be proposed in the general court, and agreed to by a majority of the senators and two-thirds of the members of the house of representatives present and voting thereon, such proposed amendment or amendments shall be entered on the journals of the two houses, with the yeas and nays taken thereon, and referred to the general court then next to be chosen, and shall be published; and if, in the general court next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of the senators and two-thirds of the members of the house or representatives present and voting thereon, then it shall be the duty of the general court to submit such proposed amendment or amendments to the people; and if they shall be approved and ratified by a majority of the qualified voters voting thereon, at meetings legally warned and holden for that purpose, they shall become part of the constitution of this commonwealth."

Articles 10 to 44, inclusive, of the amendments were adopted under the provisions for amendment made by article IX.

Another constitutional convention was held in 1853. This convention submitted to the people a revised constitution, which was rejected by them.

Articles 45 to 66, inclusive, of the amendments were submitted to the people by the constitutional convention of 1917 and were adopted at subsequent elections in 1917 and 1918. The forty-eighth amendment repealed the ninth amendment, substituting therefor provisions for amendment by initiative petition as well as by proposals introduced in the Legislature. The sixty-seventh and last amendment was submitted to the people under the provisions for amendment contained in the forty-eighth amendment, and was approved in 1922.

The forty-eighth amendment is known as the Initiative and Referendum Amendment. It begins with the following declaration of principle: —

"Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection; and the popular referendum, which is the power of a specified number of voters to submit laws, enacted by the general court, to the people for their ratification or rejection."

Then follow provisions which are grouped under three general headings: "The Initiative", "The Referendum" and "General Provisions". The provisions relating to constitutional amendments are contained under the heading "The Initiative".

Subdivision II of that heading states the requirements with respect to the contents and mode of originating initiative petitions and their transmission to the General Court, providing that certain excluded matters specified in section 2 shall not be proposed by such a petition. Subdivision III, section 2, provides for the submission to the people of a legislative substitute for any measure introduced by initia-

tive petition. The measures proposed by initiative petitions may be either constitutional amendments or laws.

Subdivision IV is entitled "Legislative Action on Proposed Constitutional Amendments". The provisions of that subdivision are as follows:

"SECTION 1. *Definition.* — A proposal for amendment to the constitution introduced into the general court by initiative petition shall be designated an initiative amendment, and an amendment introduced by a member of either house shall be designated a legislative substitute or a legislative amendment.

SECTION 2. *Joint Session.* — If a proposal for a specific amendment of the constitution is introduced into the general court by initiative petition signed by not less than twenty-five thousand qualified voters, or if in case of a proposal for amendment introduced into the general court by a member of either house, consideration thereof in joint session is called for by vote of either house, such proposal shall, not later than the second Wednesday in June, be laid before a joint session of the two houses, at which the president of the senate shall preside; and if the two houses fail to agree upon a time for holding any joint session hereby required, or fail to continue the same from time to time until final action has been taken upon all amendments pending, the governor shall call such joint session or continuance thereof.

SECTION 3. *Amendment of Proposed Amendments.* — A proposal for an amendment to the constitution introduced by initiative petition shall be voted upon in the form in which it was introduced, unless such amendment is amended by vote of three-fourths of the members voting thereon in joint session, which vote shall be taken by call of the yeas and nays if called for by any member.

SECTION 4. *Legislative Action.* — Final legislative action in the joint session upon any amendment shall be taken only by call of the yeas and nays, which shall be entered upon the journals of the two houses; and an unfavorable vote at any stage preceding final action shall be verified by call of the yeas and nays, to be entered in like manner. At such joint session a legislative amendment receiving the affirmative votes of a majority of all the members elected, or an initiative amendment receiving the affirmative votes of not less than one-fourth of all the members elected, shall be referred to the next general court.

SECTION 5. *Submission to the People.* — If in the next general court a legislative amendment shall again be agreed to in joint session by a majority of all the members elected, or if an initiative amendment or a legislative substitute shall again receive the affirmative votes of at least one-fourth of all the members elected, such fact shall be certified by the clerk of such joint session to the secretary of the commonwealth, who shall submit the amendment to the people at the next

state election. Such amendment shall become part of the constitution if approved, in the case of a legislative amendment, by a majority of the voters voting thereon, or if approved, in the case of an initiative amendment or a legislative substitute, by voters equal in number to at least thirty per cent of the total number of ballots cast at such state election and also by a majority of the voters voting on such amendment."

By subdivision VIII under the heading "General Provisions" article IX of the amendments to the Constitution is annulled.

By the terms of the provisions quoted above it will be seen that a constitutional amendment may be made in one of three ways, — (1) by initiative petition; (2) by legislative substitute; and (3) by legislative amendment. When the requirements governing the methods of proposal have been complied with, and when the amendment has been approved by the people in accordance with the provisions of section 5, "such amendment shall become part of the constitution . . ."

Aside from the provision in article VII of the Bill of Rights, declaring the right of the people to reform, alter, or totally change their government, the only provisions contained in the existing Constitution for making changes therein are in the forty-eighth amendment. This amendment speaks only of *amendments* to the Constitution. If then a "revision" or a "rearrangement" of the Constitution means something different from an amendment, there is no provision in the forty-eighth amendment for such a change.

The meaning of the words "rearrangement" and "revision" received careful consideration in *Opinion of the Justices*, 233 Mass. 603, and in Loring *v.* Young, 239 Mass. 349. According to the views there expressed "rearrangement" means a change in form without change in substance, while "revision" means a change in substance as well as form and contemplates the substitution of the new for the old. The word "amendment", on the other hand, whatever else it may connote, at least implies that one thing is to be altered or added to by another. It presupposes an existing structure. Shields *v.* Barrow, 17 How. 130, 144; Gagnon *v.* United States, 193 U. S. 451, 457. It contemplates that,

upon adoption, the thing so designated shall become a part of that pre-existing structure. An amendment is not a self-supporting entity. It must be an amendment *to* something. It is incapable of existing *in vacuo*.

Both a revision and a rearrangement which substitute a new constitution for the old are essentially different from an amendment. This was the conclusion of the justices in *Opinion of the Justices*, 233 Mass. 603, 609, and in both majority and minority opinions in Loring *v.* Young, 239 Mass. 349, 373, 375, 380, 400. In chapter VI, article X of the original Constitution the words "revision" and "amendment" are used disjunctively, and in Gen. St. 1916, c. 98, relative to the calling and holding of a constitutional convention, the purpose of the proposed convention is stated to be "to revise, alter or amend the constitution of the commonwealth", and the delegates were authorized to "take into consideration the propriety and expediency of revising the present constitution of the commonwealth, or making alterations or amendments thereof".

I conclude, therefor, that the power to amend the Constitution is different from the power to establish a new constitution superseding and replacing the old. The power to amend the Constitution is the power to add to or alter, but not to supersede. That the power conferred upon the General Court by the forty-eighth amendment to the Constitution is the power to initiate amendments to the Constitution, not to initiate a revision of that Constitution, seems to me beyond question. *Amendments* are to be submitted to the voters; and such amendments are to "become *part of the Constitution* if approved."

Senate Resolve No. 54 is entitled "Resolve to provide that the Rearrangement of the Constitution adopted by the Voters in November, Nineteen Hundred and Nineteen amended to conform to Existing Law, shall be the Constitution of the Commonwealth"; and purports to propose "Articles of Amendment", providing that "The Constitution or Form of Government of the Commonwealth of Massachusetts, adopted in seventeen hundred and eighty, and the sixty-seven articles of amendment thereto, is hereby deemed

and taken to be revised, altered and amended by the Rearrangement of the Constitution adopted by the voters at the state election in November, nineteen hundred and nineteen, which is hereby declared to be the Constitution of the Commonwealth of Massachusetts," with certain specified amendments thereto; and that "the Constitution or Form of Government for the Commonwealth of Massachusetts will then be as follows."

The court held in Loring *v.* Young, 239 Mass. 349, that the Rearrangement of the Constitution submitted to the voters in 1919 contained changes in substance as compared with the Constitution of 1780 and its amendments, that the Rearrangement, however, provided that in case of conflict the old Constitution and its amendments should prevail, that the voters did not intend to adopt a new form of government, and that accordingly the old Constitution and its amendments was still the fundamental law. It is this very Rearrangement, set out anew in Senate Resolve No. 54, with some amendments introducing further changes in substance, as to which my opinion is now required.

The proposed resolve is, in my opinion, open to the objection that it is a revision of the Constitution rather than an amendment. Such is the plain purport of the provisions that the so-called "Rearrangement" "is hereby declared to be the Constitution of the Commonwealth of Massachusetts" and that "the Constitution or Form of Government for the Commonwealth of Massachusetts will then be as follows." It proposes to substitute a new constitution for the old. In my opinion, therefore, this "Rearrangement" is not within the terms of the amending power as defined in the forty-eighth amendment.

As I have said, the Constitution provides no method for making changes in it, except as set out in the forty-eighth amendment, unless such provision is to be found in the seventh article of the Bill of Rights. By virtue of this declaration, the court has intimated that "the people of the Commonwealth have under the Constitution the right to alter their frame of government according to orderly methods as provided by law, and through the medium of an act of the Legislature," and that therefore the calling of a constitu-

tional convention may be sanctioned by the Constitution. *Opinion of the Justices*, 226 Mass. 607, 610. See also *Opinion of the Justices*, 6 Cush. 573.

But this does not mean that the Legislature may initiate a revision of the Constitution. It has no inherent power to submit to the people for ratification a new constitution, nor can such a proceeding be supported either by custom or as an orderly method provided by law. See Jameson on Constitutional Conventions, 4th ed., §§ 570 and 574 *h*. The proposing of constitutional amendments or of new constitutions is hardly to be deemed a normal exercise of legislative function, authority for which may be sought and found in the general grant of legislative power under the Constitution. 1 Deb. Mass. Conv. 1820, pp. 405, 407. See Jameson on Constitutional Conventions, 4th ed., §§ 549 and 551. A suggestion has been made that the Legislature, in passing a legislative amendment, should be regarded as a constitutional convention, because the proposal must be acted upon in a joint session of the Legislature. But the distinction between a joint session of the Legislature and a constitutional convention is, to my mind, both clear and fundamental. A constitutional convention is perhaps the most solemn, deliberate and highest assembly which can be convened in this Commonwealth. Sproule *v.* Fredericks, 69 Miss. 898. Constitutional conventions have been held only three times since the adoption of the Constitution in 1780. Delegates are elected to a constitutional convention for the sole purpose of determining whether the Constitution shall be revised, altered or amended. Legislative sessions are held annually. Members of the Legislature are elected for the important purpose of enacting all manner of wholesome and reasonable laws for the general welfare of the people. It was never contemplated that the duties of the two bodies should be merged in the General Court, or that the Legislature, of its own initiative, should have the right to submit a new constitution to the people.

My answer to your first question is therefore in the negative. Reiterating, to avoid the possibility of misunderstanding, that I interpret your questions as referring to the

existing Constitution and to the rights and powers derived therefrom, and that by a "revised or rearranged constitution" you mean a new constitution substituted in place of and superseding the Constitution now in force, what I have already said covers your second and third questions.

Yours very truly,

JAY R. BENTON.
Attorney General.

V

2

R

A

1

4

X